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Vol. 3123

No. 15,619

In the
United States Court of Appeals
For the Ninth Circuit

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellant,

vs.

MARY TROUTFELT COHEN,

Appellee,

and

MARY TROUTFELT COHEN,

Appellant,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

Brief of Plaintiff in Support of Cross-Appeal

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FILED

MAY - 1 1957

PAUL P. GRIEN, C.

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JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

Brief of Plaintiff in Support of Cross-Appeal

This action was a suit on a contract of life insurance by the insured's widow and beneficiary against the insurer (F. 3, 4; R. 101)* From a judgment in her favor (R. 107) the defendant has appealed. (R. 109) The plaintiff has cross-appealed from the failure of the District Court to include in the judgment in her favor any sum on account of a breach by defendant of its written warranty that

*The notation "F....." refers to the District Court's findings.

"It is not necessary to employ any firm or person to collect the proceeds of this policy." (Ex. 1; R. 113)

This brief is confined to the cross-appeal and presupposes that defendant's appeal will be unsuccessful. The lack of merit of that appeal will be discussed in the brief to be filed by plaintiff in due course as appellee.

JURISDICTIONAL STATEMENT

The action was begun in the Superior Court of the State of California in and for the City and County of San Francisco (R. 8) and was removed by the defendant to the court below (R. 6) pursuant to 28 U.S.C. § 1441. The District Court had jurisdiction under 28 U.S.C. § 1332(a)(1) (F. 1, 2; R. 100, 101), and this Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

In 1939 Martin E. Troutfelt—like a million other Americans—took out insurance with defendant for the protection of his wife in the event of his death (F. 4, R. 101). In addition to the \$5,000 face amount of the policy (R. 31), the contract, by the "Supplementary Provision for Family Income" (R. 36), provided in plain English that the defendant insurer would pay his widow \$50 a month from his death until the lapse of 20 years after the policy's effective date, i.e., until February 1959 (F. 5; R. 101).

Secure in the belief that his wife was provided for, Troutfelt—like a million other Americans—accepted the policy delivered to him and dutifully paid all the premiums called for by the contract (F. 6; R. 102), until he died on June 28, 1945 (F. 13; R. 104).

Thereupon, his widow, the plaintiff, transmitted the original policy (Ex. 1; R. 124) to defendant as part of the proof of death and claim for payment, and as part of its processing of the claim defendant executed on the contract the assurance (F. 10; R. 103):

"Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income dated February 24, 1939 attached hereto."

So endorsed, the policy was returned to plaintiff (F. 10; R. 104).

Defendant made the monthly payments through February 1, 1954 (F. 13; R. 104). Then, although there were still 5 years to go, and 9 years after making the ratification and promise just quoted, 9 years after the husband's mouth was closed by death, and 15 years after the policy was issued, defendant notified plaintiff that it would make no more monthly payments and offered the \$5000 face amount as full discharge of its obligations (F. 13, 14; R. 104).

Defendant's excuse for this outrageous conduct was that the Supplementary Provision, written by itself, did not mean what it said. Although it plainly provided for monthly payments until the lapse of 20 years, it should have said 15 years, and there was, forsooth, a "mistake"! Indeed, defendant brazenly stated that it *never* considered its policy to represent its contract (R. 57, 144).

To collect the additional \$3000 due her (5 years of monthly payments of \$50 each) plaintiff was thus precipitated into a lawsuit, compelled to sue, to defend against a counterclaim, and then, after a judgment in her favor rejecting defendant's preposterous position, to defend an appeal. In short, it was "necessary to employ a firm or person to collect the proceeds of the policy", to wit, attorneys. For that reason plaintiff incorporated in her complaint (R. 83) a claim for breach of the warranty that

"It is not necessary to employ any firm or person to collect the proceeds of this policy."

The trial court gave plaintiff judgment for \$8,000, being the \$5000 face amount plus the \$3000. But it denied plaintiff *any* sum as damages for breach of the warranty just quoted.

STATEMENT OF THE QUESTIONS INVOLVED

When a contract of life insurance provides that

"It is not necessary to employ any firm or person to collect the proceeds of this policy"

and the insurer's wrongful refusal to pay these proceeds compels the beneficiary to employ counsel to sue therefor, is not the beneficiary, upon recovering judgment for the proceeds, entitled to damages for breach of warranty, and is not a reasonable attorney's fee a measure of the damages?

SPECIFICATION OF ERROR

The trial court erred in failing to award plaintiff any damages on account of the breach, by defendant, of its written warranty that

"It is not necessary to employ any firm or person to collect the proceeds of this policy."

ARGUMENT

The provision that

"It is not necessary to employ any firm or person to collect the proceeds of this policy"

is a warranty. Thus in *Guardian Life Insurance Co. of America v. Brackett*, 108 Ind. App. 442, 27 N.E. 2d 103 the insurance contract contained a similar provision:

"To collect the amount payable under this policy it is not necessary to employ any person, firm or corporation."

The court said of this clause (27 NE 2d at 109):

"This endorsement was, no doubt, for the purpose of assuring the policyholder his interests would be cared for by the insurer, and that *he need not expend money for counsel relative thereto. The policy holder had a right to rely upon the endorsement*, and no doubt, did so rely thereon when he purchased the policy * * *"

It is, of course, precisely because the defendant wishes its policyholders to rely on this provision that it places it in a prominent place on the contract.*

*The policy folds into a document about 4 x 9 inches. The warranty is so placed that it is seen immediately in the first stage of unfolding.

To treat the clause as other than a warranty would be to make it mere sales puff, something inconceivable in a life insurance contract, for it would then be a snare and deceit for those seeking protection for the people they leave behind. As said in *Bollinger v. National Fire Ins. Co.*, 25 Cal. 2d 399, 405, 154 P.2d 399, 403:

“it must not be forgotten that the primary function of insurance is to insure.”

The purpose of clauses in a contract of insurance is to protect the beneficiary, not to delude the assured.

The provision in question was a warranty, and it has been breached in this case, for the beneficiary has been compelled to employ attorneys to press her claim to proceeds wrongfully denied. The damages flowing from this breach are at least the costs and expenses of the litigation and, more particularly, the expense of employing a “firm or person to collect the proceeds of the policy”, to use the very language of the policy itself.

To hold otherwise would make it possible for a large insurance company, with its vast resources, callously to oppress a needy beneficiary. The amount involved is small. The insurer in effect says to the beneficiary:

“Take what we offer or go to court. There you have nothing to gain but trouble and worry, for if you prevail and recover, after we have carried you as far on appeal as we can, you will have incurred attorneys’ fees that will eat up the whole recovery; or else you must employ attorneys of lesser competence or lesser experience to confront our able counsel, in order to be able to pay only a small fee.”

What a Hobson’s choice for the beneficiary! As said in a somewhat similar situation, *Arenson v. National Automobile & Casualty Ins. Co.*, 48 A.C. 531, 542, 310 P.2d 961, 968:

“Sustaining such a theory would not only tend to discourage busy attorneys from rendering adequate services for needy clients but would tend also to encourage insurance companies to similar disavowals of responsibility with everything to gain and nothing to lose.”

Reason for District Court's denial of damages.

The District Court disallowed plaintiff's claim involved in this cross-appeal on the theory that plaintiff sought to recover "an award of attorney's fees" and that "an award of attorney's fees must be authorized by statute or by an agreement of the parties". (R. 81) We have no quarrel with this statement of the law. But it misconceives the issue. Plaintiff does *not* seek "an award of attorney's fees" *as such*, but damages for breach of a warranty. That those damages happen, in this case, to be measured by what would be a reasonable attorney's fee cannot defeat the right.

Suppose the clause in the policy had read,

"Insurer warrants that it will not be necessary for beneficiary to employ any firm or person to collect the proceeds of this policy."

The language actually used means the same thing, but the supposition clarifies the issue. That warranty would have created an obligation for breach of which the insurer would have to pay any damages proximately caused. That obligation would be separate from and *additional* to the obligation to pay the insurance proceeds, for the insurance would be payable even though the additional warranty were not present. The warranty in this case adds a separate obligation, and the damages caused by its breach are the expense of employing a person or firm to collect the proceeds.

The trial court's opinion observes that (R. 81):

"In the opinion of this Court the quoted language is not sufficiently definite. If the clause in question was meant to apply to attorney's fees, the phrase 'attorney's fees' could easily have been used."

It has been endlessly reiterated (e.g., in *Continental Casualty Co. v. Phoenix Construction Co.*, 46 Cal. 2d 423, 437, 296 P.2d 801, 809):

"It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against

the insurer. [Citations omitted.] If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. [Citation omitted.] If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against [Citations omitted.] the amount of liability [Citations omitted] or the person or persons protected [Citations omitted] the language will be understood in its more inclusive sense, for the benefit of the insured."

The reason that the precise phrase, "attorney's fees", is not used is that the obligation is *broader* than to pay attorney's fees. It relates to any person or firm, and the more inclusive necessarily includes the lesser. An insured under a policy containing this language might engage a non-lawyer—an insurance expert—to collect by persuasion, or a broker to collect by promise of future favors. In that event the damage would be the expense of engaging him, i.e., an "expert's fee". It happens that the persons necessarily employed in the instant case were attorneys, and the expense may therefore loosely be called an "attorney's fee". But the name should not deprive the insured of the right to damages flowing from the breach of the warranty.

There are many situations in which "attorney's fees" have been awarded, *not as such*, but as the damages for breach of an obligation which fails to mention attorney's fees in terms.

Thus, insurance companies regularly agree to defend their assureds against claims. When the insurer violates its obligation to defend, the insured is entitled to retain counsel and recover the expense thereof from the insurer *not* because the policy provides for the payment of "attorney's fees" but because the *measure of damages* for breach of such an undertaking includes the expense of counsel. As said in *Arenson v. Nat. Auto. & Cas. Ins.*

Co., 48 A.C. 531, 542, 310 P.2d 961, 968, in awarding an assured a judgment to cover his obligation to his attorney:

“Here, the company agreed to defend any suit brought against Arenson * * * Having defaulted such agreement the company is manifestly bound to reimburse its insured for the full amount of any obligation reasonably incurred by him.”

Again, by statute (Probate Code § 680), the estate of a father is obligated to pay to a child “a reasonable allowance * * * for maintenance”. Although the statute says nothing about attorney’s fees, in *Estate of Filtzer*, 33 Cal. 2d 776, 781, 205 P.2d 377, 380, the Court affirmed an allowance including compensation for petitioner’s attorney, saying:

“While appellant cites no authority holding that attorney fees are not allowable in a proceeding such as this, he relies on the general rule that ‘attorney’s fees’ are not recoverable unless ‘specifically provided for by statute * * * [or] agreement * * * of the parties’ [citing authorities]. * * * “However, such authorities have no relevancy here, for the trial court did not deem ‘petitioner * * * entitled to *attorneys fees as attorneys fees*’ but correlated such added relief with the concept of an obligation assumed by her on behalf of the child ‘to defend his rights’ to share in the decedent’s estate.”

Another example may be found in warranty deeds. The deed nowhere mentions attorney’s fees, but in it the grantor warrants seizin, quiet enjoyment, to defend the title, etc. If the grantor fails to defend against a hostile claim, the grantee may protect his rights, either as plaintiff or defendant, and recover from his grantor, as damages for breach of warranty, compensation necessarily paid his attorney. *McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; 2 Sutherland, *Damages* (4th ed.) § 617, p. 2135 et seq. The same rule applies to the implied covenant of quiet enjoyment in a lease. *Levitzky v. Canning*, 33 Cal. 299, 308; *Standard Livestock Co. v. Pentz*, 204 Cal. 618, 632, 269 Pac. 645, 650. Similarly,

when a contractor promises to build a structure, and a bonding company agrees to indemnify the owner for loss caused by the contractor's breach, the owner may recover damages against both the contractor and the surety *measured* by counsel fees incurred by the owner in defending actions brought by lien claimants. *Bird v. American Surety Co.*, 175 Cal. 625, 631, 166 Pac. 1009, 1012.

A contract must be so construed as to give effect to every part. Cal. Civ. Code, Sec. 1641; 3 Williston on Contracts, § 618, p. 1779. Every word and phrase should be given meaning. *Basler v. Warren*, 159 F.2d 41, 43 (10 Cir.).

If the clause in question on this cross-appeal does not entitle plaintiff to damages for its breach, measured by the expense of engaging someone to collect the proceeds of the policy, then the clause has no effect and has become idle verbiage. The consequences would be that, although the insured prevails in a suit forced on her by the insurer's wrongful refusal to pay, she nevertheless loses, because a substantial portion or all of the insurance will be consumed in necessary expense. *If* there were no provision in the policy, this unfortunate and unjust consequence might have to be borne. But the policy *does* contain the warranty, and we respectfully submit that effect should be given to it.

CONCLUSION

The complaint prayed for \$1500 as the reasonable amount of attorney fees for services in the trial court. Having been forced to defend the appeal, plaintiff is entitled to an additional amount, and we submit that an additional \$1500 would be reasonable. Since the value of attorney's services in a court is a matter within the knowledge of the court, from judicial experience the court can fix the amount without extrinsic evidence. *Standard Oil & Gas Co. v. Guertzgen*, 100 F.2d 299, 302 (9 Cir.); *Warner v. Warner*, 34 Cal. 2d 838, 843, 215 P.2d 20, 23. Three courses are possible:

1. This Court can fix the amount of the fee for services on the appeal and remand the cause to the District Court with directions

to fix the amount of fees for services rendered in that court and to add both sums to the judgment.

2. It can itself fix the entire amount of fees for services in both courts and modify the judgment to add that sum to the recovery.

3. Or it can remand the cause to the District Court with directions to determine the amount of fees for services in both courts and to add that sum to the judgment.

We respectfully submit that one of these three courses should be followed.

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Mary Troutfelt Cohen

No. 15,619

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For the Ninth Circuit

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COMPANY, a corporation,

Appellant,

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and

MARY TROUTFELT COHEN,

Appellant,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This action to collect the proceeds on a family income rider to a life insurance policy was commenced against appellant in the Superior Court of the State of California in and for the City and County of San Francisco. (R. 8.) Appellant petitioned for removal to the United States District Court for the Northern

District of California, Southern Division (R. 6), and the action was removed to that Court pursuant to the provisions of Title 28, United States Code, §§ 1332, 1441, in that it is a civil action wherein the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interests and costs, and is between citizens of different states. The case was tried without a jury before Judge Carter, whose Memorandum Opinion (R. 75) is reported atF. Supp. Judgment for plaintiff was entered March 20, 1957. (R. 107.) A notice of appeal was filed March 27, 1957. (R. 109.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE CASE.

The plaintiff, Mary Troutfelt Cohen, brought suit against the John Hancock Mutual Life Insurance Company to recover damages for an alleged breach of the contract of insurance which had been taken out by her now-deceased husband. (R. 8.) Plaintiff alleged that under the terms of that life insurance contract, and specifically under the provisions of the family income supplemental provision thereto, the defendant was obligated to pay to her a monthly sum of fifty dollars after the death of insured for a period extending for twenty years subsequent to the date of issuance of the policy. (R. 10.) Plaintiff next alleged that the defendant fully performed under the policy of insurance up to a time 15 years from the date of issuance of the policy, at which time defendant tendered the final payment provided for in the policy

but refused to continue the monthly annuity for five more years. (R. 10-11.)

Defendant insurance company filed an answer and counterclaim, admitting the existence of an insurance contract and alleging a willingness to perform its obligations under that contract, but denying that the contract that was entered into between itself and insured called for the monthly annuity of fifty dollars to extend for any longer period than fifteen years from the date of issuance of the policy. (R. 18.) It is the contention of the defendant that the true agreement between the contracting parties is shown by the application for the insurance policy and other data and correspondence relevant to this policy, and that the written copy of the contract which was sent to the insured did not contain the agreement of the contracting parties, due to an accident or error in transcribing that agreement. (R. 23.) Defendant set up these allegations both by way of defense to plaintiff's cause of action and as the basis for affirmative relief, namely reformation of the contract.

The Court below rendered judgment for plaintiff, denying any relief to defendant on its counterclaim. The basis of this decision was a ruling that the agreement between the parties was contained in the written copy of the contract in the possession of the plaintiff. The Court relied also on the statute of limitations in finding against defendant insurance company.

The evidence at the trial was as follows:

In the early part of 1939, one Martin E. Troutfelt applied for and received a policy of insurance num-

bered 3171136 which provided for payment of premiums over a period of twenty years. (R. 158.) Included in this policy was a supplemental family income provision, which required an extra premium for fifteen years and provided an annuity to the beneficiary for a period of twenty years. (R. 164.)

Shortly thereafter, Martin E. Troutfelt made application to convert this policy, stating therein that he desired to change the twenty payment life to a fifteen year endowment. The application also requested a family income rider, but did not specify the period of time for which the rider was desired. (R. 170.) Additional correspondence was required to fill in this missing data, so another form was sent to the applicant for his signature. On this form the company had typed in the presumed data, namely ten years as the length of time the extra premium would be payable, and 15 years as the length of time the monthly annuity would be paid. (R. 170, 172.) This form was signed by Troutfelt and returned to the company. (R. 170.) On the basis of this form and the application previously received, the company then issued a new policy of insurance to Troutfelt, that being the policy at issue in the present case. (R. 173.) But though the application called for a fifteen year term, *and though the premium charged for the rider was the correct premium for a fifteen year term* (R. 165-166) the word "twenty" was inserted by mistake of the scrivener instead of the word "fifteen." (R. 102.)

The evidence also shows that defendant insurance company did not actually discover this mistake until

the plaintiff refused to accept its tender of the final payment. The insurance company did not keep a carbon copy of the filled-in policy or use the filled-in policy in its processing of the claim. (R. 178.) Instead, the company uses the application forms signed by the insured. (R. 178.) The company had possession of the written policy on only two occasions, the first being when the policy was originally made out and the blanks filled in (R. 173), the second being when the insured died and the policy was sent in to the company to be processed for payment. (R. 71.) But that processing, as shown above, was done on the basis of the company's records, which nowhere contain a copy of the policy as filled in. (R. 178.) The only purpose in requiring the original policy to be sent to the company is so that an endorsement may be stamped thereon, giving the beneficiary a record of the fact of processing.

The record is devoid of any evidence of negligence on the part of the company unless it is found in the facts set out above. The record similarly contains no indication of any injury to the plaintiff in the case, nor of any detrimental reliance or change of position. The record shows that there was no additional consideration running to the company which could support a new promise to pay. Finally, there is no evidence that the insured's intentions regarding the contract were at any time altered from his intention as clearly expressed in the application for insurance signed by him, no evidence that he did not continue in his original intentions and impressions regarding this contract up till the date of his death.

Nevertheless, the Court below found that the terms of the contract between the company and the insured are those found in the written policy. The Court also found that there had been a scrivener's mistake, but ruled that it was merely a unilateral mistake, since insured neither knew nor suspected, nor reasonably could or should have known or suspected that a mistake had occurred. Finally, it was ruled that the insurance company was negligent in not discovering the mistake on each of the occasions when it had possession of the original policy. From the facts as thus determined, the Court then held that defendant did not have a right to relief, and that even should such right have once existed, it was now barred by the statute of limitations. The Court then held defendant in breach of its contract, applied the doctrine of anticipatory breach, and rendered judgment for plaintiff in the sum of \$8000.00 plus various sums of interest. Defendant prosecutes this appeal from that judgment.

QUESTIONS PRESENTED.

1. Whether the lower Court did not err in applying the doctrine of anticipatory breach to this contract which involved installment payments of money.
2. Whether the lower Court did not err in failing to apply and give controlling effect to the law of the State of New Mexico in adjudicating the substantive issues of this case.
3. Whether the lower Court did not err in its construction of the terms and obligations of the contract

as a matter of law; whether the only construction permissible under the evidence is not one that precludes a finding that defendant breached its contract.

4. Whether under the facts of this case, and the applicable law, defendant is not entitled to reformation of the contract as written to accord with the contract as mutually intended.

5. Whether under the facts of this case and the applicable law, defendant does not have a complete defense to plaintiff's suit for breach of contract.

6. Whether the lower Court did not err in finding that defendant's counterclaim for reformation was barred by the statute of limitations, in that it misinterpreted the legal requirements for starting the running of the period of limitations.

7. Whether the lower Court did not err in finding that defendant's defense of mistake was barred by the statute of limitations.

SPECIFICATION OF ERRORS.

1. The Trial Court erred in finding that by the terms of the contract between this appellant and the insured the said insured was to pay premiums for 15 years from the effective date thereof.

2. The Trial Court erred in finding that by the terms of said contract this appellant agreed to make monthly payments of \$50.00 per month to plaintiff for a period extending to and including February 1, 1959.

3. The Trial Court erred in finding that the said insured did not know nor suspect, nor reasonably could or should have known or suspected any mistake in writing the premium payment term in the supplementary provision for family income as 15 (instead of 10) years, or in writing the income payment period therein as 20 (instead of 15) years, and in finding that such a mistake was the unilateral mistake of defendant alone.

4. The Trial Court erred in finding that in the exercise of ordinary care or reasonable diligence, this appellant could have discovered its alleged mistake in 1939, or in 1945.

5. The Trial Court erred in finding that this appellant discovered its alleged mistake in 1939 or at the latest on July 26, 1945.

6. The Trial Court erred in finding and concluding that this appellant committed an anticipatory breach of the said contract on or about May 13, 1954.

7. The Trial Court erred in awarding judgment to respondent in the sum of \$8,000.00, together with interest at 7% per annum until the date of entry of judgment on installments of \$50.00 dating from March 1, 1954.

8. The Trial Court did not err in failing to award to respondent damages on account of this appellant's alleged breach of the following alleged warranty:

“It is not necessary to employ any firm or person to collect the proceeds of this policy.”

ARGUMENT.

- I. UNDER NO CIRCUMSTANCES WAS THE TRIAL COURT JUSTIFIED IN APPLYING THE DOCTRINE OF ANTICIPATORY BREACH. THE DOCTRINE OF ANTICIPATORY BREACH IS NOT APPLICABLE WHERE THE CONTRACT HAS BECOME UNILATERAL IN PERFORMANCE, SO THAT ALL THAT REMAINS TO BE PERFORMED IS INSTALLMENT PAYMENTS OF MONEY.

This proposition is too well established to require more than a brief citation of authority. See, for example, *Restatement of Contracts*, § 318, Comment (e); 12 Cal. Jur. 2d, Contracts § 250. The subsequent portions of this brief conclusively show that plaintiff is not entitled to any recovery at all. But, in any event, the Court had no authority to award plaintiff any more than the amount of the installments already due and owing.

This case provides a classic example of the type of case in which anticipatory breach is inapplicable. The only performance that remains under this contract is the payment by the insurance company of certain sums of money, to be paid in installments on specified dates. No further performance is required of the insured or of plaintiff. No further conditions must be met by the insured or by plaintiff. Plaintiff is fully protected by giving her exactly what was bargained for, *i.e.*, installment payments of money. She can recover now only those installments now due.

This was the holding of *Cobb v. Pacific Mutual Life Ins. Co.*, 4 Cal. 2d 565, 51 P. 2d 84, an insurance case in which this question was the sole issue raised on appeal. The Court exhaustively considered the ques-

tion, and an extensive list of authorities can be found in the opinion. The conclusion was that anticipatory breach may not apply to installment payments of money. The Court below therefore erred prejudicially in including in its judgment those installments which were not yet due or owing to plaintiff.

II. THE LAW OF THE STATE OF NEW MEXICO IS THE CONTROLLING BODY OF LAW IN ADJUDICATING THE MERITS OF THIS CASE; AND THE COURT BELOW ERRED IN FAILING TO APPLY IT.

Before proceeding to the substantive law of the case, it becomes necessary to determine which body of law will be controlling. This case is within the jurisdiction of the federal Courts only by virtue of diversity of citizenship. The questions at issue pertain to matters of state law. Under these circumstances, the famous *Erie* doctrine requires the federal Court to apply on all matters of substance the law of the state in which the federal Court is sitting. Thus, the law of the state of California will govern this dispute.

But there is another Conflicts problem present in this case. The transaction which is the basis of suit is not local to California. Thus, the California Courts would themselves refer to the law of another jurisdiction to decide the substantive issues presented. The federal Court under the *Erie* doctrine is governed by this California conflicts rule. See, e.g., *Griffin v. McCoach*, 313 U.S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481; *Zellmer v. Acme Brewing Co.*, 184 Fed. 2d 940 (9th Cir. 1950).

California law is clear that under the facts of this case, the law of New Mexico will be applied to determine the rights of the parties to this dispute. The California rule is that contracts are governed by the law of the place of performance, if that place is ascertainable, and otherwise, by the law of the place of formation. The rule is incorporated in the California Civil Code, § 1646:

“A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.”

See also, *Pregresso S.S. Co. v. St. Paul etc. Ins. Co.*, 146 Cal. 279, 79 Pac. 967; *Pratt v. Dittmer*, 51 Cal. App. 512, 197 Pac. 365; *Flittner v. Equitable Life Assur. Soc.*, 30 Cal. App. 209, 157 Pac. 630.

The facts show that the application for Policy No. 3223099 was made in New Mexico (R. 173), that premiums were paid from there (R. 173), that the policy was delivered there (R. 173-174), and that the contract presumably was to be performed there by payment to the insured or his beneficiary. Under this set of facts, New Mexico is both the place of performance and the place of formation of the contract at bar. It is inescapable, therefore, that the law of New Mexico will govern this dispute.

New Mexico case law is rather sparse, and yet we are fortunate to have at least one New Mexico case on each of the three heads under which appellant seeks relief. And it will be seen that in each area,

construction of the terms of a contract, mistake as a ground for reformation and mistake as a defense to a suit, the New Mexico law as revealed by these cases, both in their holdings and their language, is unequivocally in favor of appellant's positions. The Court below erred in ignoring the controlling effect of these New Mexico cases.

III. THE ONLY PROPER CONSTRUCTION OF THE CONTRACT HERE WOULD PRECLUDE THE ERRONEOUS FINDING THAT APPELLANT BREACHED ITS CONTRACT.

Appellant's first contention is that before any talk of breach can be considered proper, it is first necessary to construe the contract and define the obligations of the parties under the contract, and that when this has been done it will be seen that appellant has tendered full performance of its contract obligations. In so construing the contract, it is essential to regard the contract as a whole, harmonizing its parts and noting the interplay among them. This is a familiar process, arising to some extent in every suit upon a contract. It has nothing to do with the equitable right to reformation or with the doctrines involving mistake.

The contract of insurance in the present case is embodied in a writing, thus greatly simplifying our task. But it is important to notice that *one part of this writing is the application for insurance which was made out by the insured* and processed by the insurer. The first page of the formal policy explicitly states as follows:

This insurance is granted in consideration of the application herefor, a copy of which is attached hereto and made a part of this contract . . .

Such a provision is clearly sufficient to incorporate all of the terms of the application into the formal contract. The complete contract thus contains duplicating provisions in many respects. Among those provisions which are duplicated are the crucial ones at issue here, relating to length of time the rider should be effective. The contract in one place gives that time as "20 years", but in another place recites that time as "15 years." Here, then, is an ambiguity or inconsistency apparent on the face of the instrument. Where such ambiguity exists, the Court has a preliminary job of construction. To aid in this construction, parol evidence and the history of the transaction and any other relevant circumstances should be examined. This is the rule announced in the New Mexico case of *Franciscan Hotel Co. v. Albuquerque Hotel Co.*, 24 P.2d 718 (New Mexico). The contract in that case involved a lease of hotel property. Plaintiff requested reformation, or in the alternative, construction and interpretation of the contract as written. The Court found that construction was necessary, though the ambiguity in that case was not nearly so striking as the one involved here. In resolving the ambiguity in favor of plaintiff, the Court relied heavily upon the prior dealings between the parties. The goal of course was to reach the real intent of the parties. So here, our object is to discover the real intent of the insurer and the insured. Here too, the prior dealings

between the parties are revealing of that intention. The history of the transaction shows that a 15 year term was the one intended by both parties. The history of the transaction also discloses how the figure "20" came to appear upon the document; it had its source in a prior 20 year contract that was abandoned and superseded by the present contract.

But the proof which removes all doubt as to intention is the application for insurance itself. New Mexico law is clear on the importance of the application in a case like the present. In *Bass v. Occidental Life Ins. Co.*, 142 Pac. 798 (New Mexico) the Court was presented with a formal policy of accident insurance and the application for that policy. The matter at issue was the coverage provided by the insurance contract. The Court ruled that the application and the policy must be construed together. The application and the policy each limit and modify the other. This is so even though the two writings were executed on different dates. The Court observed as follows (p. 800):

Can it be said that the applicant for insurance is not to be bound by the express terms of the instrument signed by him, which was in effect his application for insurance. We think not.

The important significance to be attributed to the application for issuance is further illustrated in *Points v. Wills*, 97 P.2d 374 (New Mexico).

The precise issue raised here was raised and answered in *Castellina v. Vaughan*, 11 S.E.2d 536 (W. Va. 1940). In its syllabus, the Court said:

In construing insurance contracts, courts should give effect to the intentions of the parties. When a policy incorporates the application, but through clerical inadvertence departs from it, the policy does not reflect that intention and the application controls.

The Court below erred in ignoring the intention of the parties, an intention indisputably disclosed by the application for insurance, the business policies of the insurer, and the entire history of the transaction. The only proper construction of the contract must be that a 15 year rider was intended. And this Court should so hold. No evidence save the item that gave rise to the ambiguity itself indicates otherwise.

IV. THE EVIDENCE IN THIS CASE SHOWS AS A MATTER OF LAW, THAT DEFENDANT WAS ENTITLED TO REFORMATION.

Appellant's second contention is that a mistake was made in the process of reducing this contract to writing; that while the terms of the policy were being copied onto the formal policy form used by the company to be delivered to the insured, the scrivener mistakenly copied the numbers "15" and "20" instead of the proper and agreed upon numbers, "10" and "15". The Court below found that such a mistake did in fact occur. (R. 76.) But the Court denied the company's counterclaim for reformation upon the ground that such relief requires "mutual" mistake, while in the present case there was only a "unilateral" mistake. The Court observed as follows (R. 79):

. . . defendant has failed to prove mutual mistake; defendant has not shown that the insured knew or should have known of defendant's mistake.

In one respect only is this mistake unilateral; namely, in that it was an employee of the company that made the error. But this is of absolutely no consequence under the law of New Mexico which must be applied here. There are two distinct doctrines comprehended under the title of "reformation", and the same terminology is employed in discussing both of them. But the requirements of each are vastly different. In this case, the defendant was relying upon and entitled to invoke one of these doctrines, but the plaintiff and the lower Court *were discussing the other*. A look at the applicable New Mexico cases will clear up the ambiguity.

The doctrine most frequently employed involves a mistake in the *formation* of a contract. One of the parties has made a mistake, so that the agreement that is reached is not an agreement that he would have voluntarily made on these terms. In such a case, that party can get relief, but he must first show that the other party shared his mistake or was aware of it. If such a showing is made, the mistake is denominated "mutual," otherwise it is denominated "unilateral." This is not the ground on which reformation is sought here.

The second doctrine of reformation involves a mistake in the transcription of an agreement. In this case, the parties have reached an agreement—a meet-

ing of the minds—in which there is no mistake. Then, while the agreement is being reduced to a formal writing, an error is made. Whether this type of mistake be referred to as mutual or as unilateral, reformation will be granted upon a showing that a prior agreement was reached and that the writing does not reflect the agreement. Appellant's right to reformation here falls under this head.

The difference between the two doctrines is concisely pointed out in the New Mexico case of *Points v. Wills*, 97 P.2d 374, 378 (New Mexico):

Where there is no mistake as to the terms of an agreement but through a mistake of the scrivener or by any other inadvertence in reducing it to writing the instrument does not express the agreement actually made, it may be reformed by the Court; it is only where an action is to reform the agreement itself that it is necessary to allege in the pleading and to prove on the trial that the mistake was mutual.

Thus it is irrelevant whether insured knew or should have known of the error in his copy of the policy. In all probability he did not notice that any change had been made. The only important question to ask is whether both parties had come to an agreement prior to the time the scrivener's error was committed. As stated in *Dearborn v. Niagara Fire Ins. Co.*, 125 Pac. 606, 608 (New Mexico), a case involving a similar reformation issue, "it is not material what language the parties used to express their mutual intent, but the question is whether their minds actually met upon a common understanding or mutual intent."

That case quoted from *Snell v. Insurance Co.*, 98 U.S. 85, as follows (p. 608):

“The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case is, we think, well settled by the authorities.”

The case of *Cleveland v. Bateman*, 158 Pac. 648 (New Mexico), another reformation case, refers to a requirement that the mistake be mutual, but makes plain that by “mutual” it means no more than that there must have been a prior meeting of the minds and a later mistake in reducing that agreement to writing.

Do the facts in the present case show such a meeting of the minds to have existed? They not only do so, but they leave no room for any other position. The facts relevant to the state of mind of the insured are indisputable. We have his application, signed by him, and under circumstances that would call these disputed terms strongly to his attention. For the importance of the insured's application in determining his state of mind, see *Points v. Wells*, *supra*; *Bass v. Occidental Life Ins.*, *supra*. The manifestations of the state of mind of the insurance company likewise leave no room for doubt. The company filled in the blanks on the application before sending it to the insured. (R. 172.) Furthermore, competent testimony has demonstrated that the company had a firm policy in regard to such terms in the policy, so that it would not issue a 20 year rider with a 15 year policy, nor would it issue a rider that did not in all respects conform to

the application. (R. 175-177, 186.) Thus we have clear and complete proof that there was an agreement, a meeting of the minds, and that both the insured and the insurer intended the contract to call for a rider with a term of 15 years. Subsequently, the scrivener mistakenly inserted the number "20" for the number "15". Therefore, "the written agreement did not effect that which the parties intended. That a Court of equity can afford relief in such a case is well settled by the authorities."

Plaintiff in the Court below objected to reformation on the theory that no enforceable contract existed prior to the receipt by the insured of the formal printed contract. But plaintiff's reasoning shows up its own fallacy. For it would preclude reformation ever being granted on an insurance contract or any other unilateral contract. Such is not the law. This precise type of argument was raised and devastated by the Court in *Columbian Nat. Life Ins. Co. v. Black*, 35 F.2d 571 (10th Cir. 1929). But we do not need to go so far afield to demonstrate that the "agreement" or meeting of the minds which is required for reformation does not have to be a valid, enforceable contract. The New Mexico case of *Franciscan Hotel v. Albuquerque Hotel Co.*, 24 P.2d 718 (New Mexico), involved a lease which was asked to be reformed. In answering an objection similar to that raised by plaintiff below, the Court pointed out that it is not necessary that there be a prior enforceable contract before reformation may be granted, only that there be a prior accord or meeting of the minds.

Such an accord has indisputably been shown to exist in the present case. The proof in this regard is subject to no other interpretation. Hence, under the applicable law, as reflected by the cases cited above, appellant was erroneously deprived by the Court below of the right to reform the instrument to make it speak in accord with the agreement between the parties. And as so reformed, it is apparent that the company has tendered full performance in complete fulfillment of its obligations under the contract.

The importance of this meeting of the minds concept in insurance cases is demonstrated by *Metropolitan Life Ins. Co. v. Banion*, 106 F.2d 561 (10th Cir.), a case from which the Court below quoted. Unfortunately, that quote did not reveal the most significant part of the holding, namely, that there was a meeting of the minds of the parties upon the terms set forth in the *policy*. The “contract” of insurance has an existence apart from any writings. The writings are only evidence of the contract. A policy which departs from the application can be a contract if there was a meeting of the minds on the provision embodied in the policy. The opposite is also true; the contract of insurance may in such a case be in accordance with the provisions embodied in the application, if it can be shown that there was a meeting of the minds on those provisions. Or the contract can be at variance with both the application and the policy. The important thing, after all, is the intent of the parties. In the *Banion* case, *supra*, the decision is replete with facts which clearly show that both parties had aban-

done the application and had reached an accord on the addition of a double indemnity provision. For example, after insured had learned that he had passed the medical requirements and had been apprised of the cost of various policies, he wrote to the company stating that a check which included the additional cost of a double indemnity provision was enclosed. He had miscalculated the cost, however, so the company requested an additional check, which the company filled out itself. The company then reported to insured that this additional check added up to full payment for the policy, including the cost of the double indemnity coverage. In our case, however, the facts show just the reverse to be true. The insured asked for a 15 year rider. He at no time made request, formal or informal, for a 20 year rider. Another contrast with the *Banion* case is the fact that our insured paid the correct premium for the 15 year rider requested by the application. The intention of the insurer in the present case is equally well demonstrated. It becomes apparent that the meeting of the minds in the present case took place on the terms as they were contained in the application. The principle of the cited *Banion* case is controlling, although the result dictated by that principle is different in this case than in that one, because of the difference in the relevant facts.

If more argument be needed, a perfect example of the problems and the proper solution of the present case is provided by *Mutual Life Insurance Co. of N.Y. v. Simon*, 151 F. Supp. 408 (S.D.N.Y. 1957).

That case involved an insurance contract in which a scrivener's error was made in respect to the sum payable. The company sought to reform the policy to express the correct sum. There, as here, there was a preliminary question of conflict of laws to be resolved. There, as here, the policy had subsequently returned to the hands of the insurance company but the error had gone undetected until a time much later. There, as here, the insured sought to capitalize on an honest mistake of the insurer to enrich himself beyond that to which he was entitled. There, as here, the company wished only to perform the contract in full, and sought merely to avoid the windfall which the insured was attempting to collect at its expense. The parallel between the two cases is striking, extending even to the numerous obstructions thrown up by the insured in an attempt to prevent reformation. But the Court disposed of each obstruction and held squarely that the policy should be reformed to express the intention of the parties. A similar result is dictated here. It is the only proper application of the relevant law to the facts of this case. And it is the only just and equitable outcome of a case like the present one, giving each party his due, and no more.

V. APPELLANT'S DEFENSE OF MISTAKE IS LIKEWISE
SHOWN AS A MATTER OF LAW.

Appellant's second contention is that under the applicable law, the type of mistake made here can be set up as a *defense* to the enforcement of the contract. This is making use of the mistake in a solely negative manner, using the fact of mistake as a shield. It does not at all involve the equitable right to reformation.

Authority for this type of relief is found in the New Mexico case of *Chaplin v. Korber Realty*, 224 Pac. 396 (New Mexico). In that case, a mistake had been made, and was attributable solely to the defendant. Plaintiff sued upon the contract and defendant set up the mistake as a defense. In allowing the defense, the Court observed as follows (p. 397):

There is another consideration which precludes recovery by the appellant. The lower Court specifically found that to enforce the contract in question would be harsh, inequitable, contrary to fairness, and against good conscience, and would permit the appellant to gain an unfair advantage from the appellee's mistake of fact. * * *

The granting or denial of the remedy is a matter of discretion which is controlled by the well-established doctrines of equitable jurisprudence. We may say generally that such relief will be granted when it appears from a view of all the facts and circumstances shown in a particular case that it will subserve the ends of justice, and for a like reason it will be withheld when it appears, from the same viewpoint, that to enforce it will result in hardship, injustice, or unfairness. If either of these would follow from grant-

ing such relief, it is the duty of a Court of equity to leave the parties to their remedies at law. And this is the rule whether the mistake be unilateral or mutual.

“Unilateral mistake of defendants not caused or contributed to by plaintiff has frequently been admitted as a defense when to enforce the contract would be harsh and unreasonable.” 36 Cyc. 605.

The present case presents a similar situation. Because of a mistake, plaintiff is seeking to impose a harsh and onerous burden upon appellant. This burden is one in excess of what was contracted for. *No consideration was given by the insured to compensate for this extra burden.* To permit plaintiff to succeed would be to permit her to take an unfair advantage over appellant for an innocent mistake. Plaintiff is not deserving of this windfall, nor is appellant deserving of this burden. Nor does the law countenance such opportunism, regardless of whether the mistake be classified as mutual or as unilateral. On the basis of the case cited above, and the well-known doctrine which it represents, appellant is entitled to a judgment. The Court below erred in disregarding this doctrine and giving judgment for plaintiff.

VI. DEFENDANT'S CAUSE OF ACTION FOR REFORMATION AND DEFENDANT'S DEFENSE OF MISTAKE ARE NOT BARRED BY THE STATUTE OF LIMITATIONS; FOR THE STATUTE DOES NOT BEGIN TO RUN UNTIL THERE HAS BEEN "DISCOVERY" OF THE FRAUD OR MISTAKE, AND THE FACTS IN THIS CASE DO NOT CONSTITUTE "DISCOVERY" ON THE PART OF THE DEFENDANT.

The applicable statute, California Code of Civil Procedure § 338(4), reads as follows:

§ 338. Three Years—Statutory Suit, Trespass, Trover, Fraud and Mistake.

Within three years:

An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

There is no contention made that defendant actually knew of the mistake until the time when plaintiff refused to accept the tender of final payment offered in good faith by defendant. The issue thus becomes whether or not on the basis of the proven facts, defendant can be deemed to have discovered the mistake, or, in other words, whether the defendant will be imputed with constructive knowledge of the mistake.

The facts on the basis of which such a constructive knowledge must be raised, if at all, are not in dispute. Defendant is an insurance company. It made out the policy which is here being sued on, and one of its employees inserted an incorrect figure in the written copy of the policy instead of the agreed upon figure. No carbon copy or other duplicate of this written copy was retained by defendant. (R. 177-178.)

This was in accord with its general practice of maintaining its records by use of the applications for insurance. (R. 177-178.) The written copy of the policy again came into defendant's hands at the time of insured's death. (R. 103.) The only purpose for the insurance company's having the written policy at that time was to stamp thereon its endorsement, which was to serve as a record for the beneficiary, to whom the written policy was then returned, that the policy had been processed for payment. At no other time was the written policy in the possession of defendant.

In ruling that these facts added up to constructive knowledge on the part of defendant, the Court below relied on the following proposition (R. 77):

But under this section [C.C.P. § 338(4)], "It is well settled, of course, that the means of knowledge are the equivalent of knowledge."

Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 703-704, 16 P. 2d 268, 270.

It is not disputed that the means of knowledge were available to defendant in the sense that it could have earlier called for the policy to be sent in to it, or that it could have closely scrutinized the policy when it was in fact sent in at the time of insured's death. But this is not the sense in which the proposition above quoted is used. Its correct meaning is apparent from the decision actually made in the case, and from other language immediately following the quoted language.

The sentence quoted by the Court and the immediately following sentence read as follows (*Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698, 703-704, 16 P. 2d 268, 270, emphasis added) :

It is well settled, of course, that the means of knowledge are the equivalent of knowledge. (Citing cases). As stated in the case last above cited, “*where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground as of the time he should have discovered it, that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so.*”

The precise holding of the Court in the *Scarborough* case, *supra*, also sheds light on this subject. Plaintiff had appealed from a judgment sustaining defendant's demurrer. The Appellate Court held that the judgment was proper, in that plaintiff's complaint was lacking one vital allegation. That deficiency was an allegation showing the times and circumstances under which the facts constituting the fraud came to plaintiff's knowledge. The reason such an allegation is required is so the Court can determine whether those same circumstances were available at an earlier time. For instance, in the *Scarborough* case, the fraud came to light because an investigation was conducted. But why, asked the Court, was an investigation instigated. And why was it not instigated earlier. Such facts should affirmatively appear in the complaint.

As applied to the present case, this holding militates against constructive knowledge. For in the present case, the mistake came to light only when plaintiff refused to accept the final payment. This was the circumstance which caused the mistake to come to light, and of necessity, this circumstance, i.e., plaintiff's refusal, could not have occurred before it did. There were no facts other than plaintiff's refusal that might have put defendant on inquiry. There were no suspicious circumstances and no known facts, which demanded that an investigation be made, and which, if followed up, would have disclosed the mistake.

The law is certainly in accord with the ideas developed above and opposed to the proposition of the lower Court that "the means of knowledge are the equivalent of knowledge." The weight of authority and especially that authority of recent date is clear that to charge a person with knowledge when there was no actual knowledge, there must be a duty on that person to investigate plus negligence on the part of that person in fulfilling his duty. But absent such a duty, the presence of means of knowledge has no legal effect.

A short but complete statement of the law in this regard is found in *Schaefer v. Berinstein*, 140 Cal. App. 2d 278, 294-95, 295 P. 2d 113, 124:

"The fact that an investigation would have revealed the falsity of the misrepresentations will not alone bar recovery. (Citing cases). The statute commences to run only after one has notice of circumstances sufficient to make a reasonably pru-

dent person suspicious of fraud, thus putting him on inquiry. 'Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.' (*Tarke v. Bingham*, 123 Cal. 163, 166.) In many cases it has been said that means of knowledge are equivalent to knowledge. This is true only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. (Citing cases.)"

See also *Hobart v. Hobart Estate Co.*, 26 C. 2d 412, 159 P. 2d 958; *Soule v. Bacon*, 150 Cal. 495, 89 Pac. 324; *Hallett v. Slaughter*, 22 C. 2d 552, 140 P. 2d 3. The question then becomes simply whether or not defendant insurance company had any duty to investigate the terms inserted in the written copy of the insurance policy, and if so, whether any of the company's acts or omissions in the handling of this policy add up to negligence, and if so, whether that negligence is enough under the circumstances to bar defendant from any relief.

There were no suspicious circumstances in this case which should have caused the defendant to call in the policy for inspection. And it would be extreme indeed to impose on insurance companies a general obligation to do so. The defendant's method of maintaining its

files, by the use of the signed applications rather than by use of carbon copies of the written insurance policies, is a sound and prudent business practice.

In addition, the precise issue raised here was raised on identical facts and decided adversely to plaintiff's contentions in the case of *Mutual Life Insurance Co. of N. Y. v. Simon*, 151 F. Supp. 408 (S.D.N.Y. 1957). The Court found that a scrivener's mistake had been made in copying certain terms from the application to the policy. The mistake was not caught by the insurance company upon the proofreading of the policy. The mistake was not caught when the policy later came again into the hands of the insurance company for various modifications. When the error was finally detected, many years later, the insurance company sued for reformation, and the insured countered with the defense of statute of limitations, but the federal District Court, *applying California law*, ruled that none of these events were sufficient to start the statute of limitations running. The mere fact that the policy was in the hands of the insurance company did not give the company actual knowledge of the mistake nor charge it with constructive knowledge. The *Simon* case is controlling of the legal significance of the identical facts present in this case.

Thus there is no evidence in the record sufficient to support the lower Court's finding that defendant insurance company received constructive knowledge of this mistake in 1939 and in 1945. Rather, it is demonstrated that there were no facts known to defendant, no suspicions entertained by defendant, and no

obligations upon defendant which would cause it to become apprised of the mistake set out here any earlier than the time when it actually did learn of the mistake, namely when plaintiff refused to accept the tender of final payment made by the company.

VII. IN ADDITION, THE APPLICABLE STATUTE OF LIMITATIONS DOES NOT APPLY WHEN FRAUD OR MISTAKE ARE RAISED AS A DEFENSE AND NO AFFIRMATIVE RELIEF IS SOUGHT THEREBY.

The latest ruling of the California Courts stands squarely for this proposition. That is the case of *Bank of America v. Vannini*, 140 Cal. App. 2d 120, 295 P. 2d 102, where the defense of fraud was interposed to a suit on a written contract. Fraud was raised both as a defense to plaintiff's cause of action and as a cross-complaint seeking damages for the defendant. The cross-complaint was held to be barred by the statute of limitations. But as to the defense of fraud, which did not involve affirmative relief, the Court ruled as follows (p. 127):

... as stated in 1 Witkin, California Procedure, page 601, it is settled that the statute of limitations "runs only against a cause of action. If the answer pleads purely defensive matter, i.e., something which constitutes a defense to plaintiff's claim without calling for any affirmative relief, this defensive relief will not be barred by limitations. This is so even though the defensive matter could have been used as the basis of a cause of action for affirmative relief, and the statute has run on any such cause of action; it may still be used defensively. This principle is

chiefly applied where the plaintiff sues on a contract, and the defendant denies any liability on the obligation on grounds of fraud. . . .”

So here, mistake is set up both by way of defense to plaintiff's suit on the contract, and by way of counterclaim for reformation of the contract. The former is defensive relief, not affirmative relief. Whether or not the statute has run on the counterclaim for reformation, it should be held inapplicable to matter raised solely as a defense.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed. In addition, the Court should direct that a judgment be entered granting reformation of the contract, as sought in defendant's counterclaim. In any event, and failing a complete reversal, the portion of the judgment respecting those installments not yet due and owing should be reversed.

Dated, San Francisco, California,
November 29, 1957.

Respectfully submitted,

HENRY C. CLAUSEN,
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*Attorneys for Appellant
John Hancock Mutual Life
Insurance Company.*

No. 15,619

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellant,

VS.

MARY TROUTFELT COHEN,

Appellee,

and

MARY TROUTFELT COHEN,

Appellant,

VS.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

BRIEF OF CROSS-APPELLEE
IN ANSWER TO CROSS-APPEAL.

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**BRIEF OF CROSS-APPELLEE
IN ANSWER TO CROSS-APPEAL.**

JURISDICTIONAL STATEMENT.

The action was begun in the Superior Court of the State of California in and for the City and County of San Francisco (R. 8) and was removed by the defendant to the Court below (R. 6) pursuant to 28

U.S.C. § 1441. The District Court had jurisdiction under 28 U.S.C. § 1332(a) (1) (F. 1, 2; R. 100, 101), and this Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

QUESTIONS PRESENTED.

Is the provision in this life insurance policy that:
 “It is not necessary to employ any firm or person to collect the proceeds of this policy”

to be tortured into a warranty by the insurance company of such a character as will obligate the insurer to pay attorney’s fees of one who engages in litigation with the company.

ARGUMENT.

- I. TO SUCCEED IN HER CROSS-APPEAL, PLAINTIFF MUST DEMONSTRATE THAT THE PHRASE IN QUESTION SHOULD BE CONSTRUED AS A WARRANTY, AND FURTHERMORE THAT IT IS A WARRANTY OF SUCH SCOPE AS TO INCLUDE ATTORNEY’S FEES OF ONE WHO ENGAGES IN LITIGATION WITH THE INSURER. PLAINTIFF’S EFFORTS IN THIS REGARD ARE TOTALLY UNCONVINCING. NEITHER THE CASE AUTHORITY NOR THE POLICY REASONS ADVANCED BY PLAINTIFF IN HER BRIEF WILL BEAR UP UNDER CLOSE SCRUTINY.

In support of her novel contention, plaintiff has unearthed one case, and one case only. But instead of supporting plaintiff’s position, that case effectively destroys it. The case in question is *Guardian Life Insurance Co. of America v. Brackett*, 108 Ind. App. 422, 27 N.E. 2d 103. The insurance policy in that

case had a clause similar to the one in dispute here, reading as follows:

To collect the amount payable under this policy it is not necessary to employ any person, firm or corporation.

By skillful editing, plaintiff has presented the Court with language from that case allegedly supporting her theories of warranty and reliance. The fact remains, however, that the Court in that case although it found for plaintiff, *did not award plaintiff attorney's fees or any amount measured by attorney's fees.*

A complete reading of this case demonstrates the correct interpretation of the insurance provision in that case and in the present one. The issue in the *Brackett* case, *supra*, was whether or not the insured had made "due proof" of disability within the proper time period. The facts showed that the insured had been rendered mentally unfit by his injury and that he had called on an agent of the insurer subsequent to that injury and apprised the agent of the fact of the injury. He did not, however, make formal application for the benefits due him under the contract. The insurer contended that a formal application was required by the policy, and that for lack of a timely formal application, it was not liable. The Court held for plaintiff, reasoning that the informal notification of disability coupled with the quoted provision in the insurance contract was sufficient to constitute "due proof." The Court relied strongly on the quoted contract provision, interpreting it to mean that the insurance company promises to assist the insured

in filling out his applications and in perfecting his rights. The company takes upon itself the obligation to investigate the claim of the insured when it is given notice that such a claim exists. This is what it meant when the policy reads that "it is not necessary to employ any person, firm or corporation to collect the amount payable under this policy."

So in the present case, the provision of the insurance policy can not be given the strained and unreasonable construction urged by plaintiff. The provision means just what it says. It says in effect "come to us, when facts occur that relate to your policy; we will investigate and tell you if these facts entitle you to payments; we will aid you in filling out any applications and forms that are required; we will help you to perfect your claims and rights under the insurance contract. There is no need to secure aid from some other person in these matters, since as one of our services, we provide that aid ourselves."

A provision with such a meaning has a logical place in an insurance contract. In addition to paying out money, the modern insurance company engages in numerous other services to assist and benefit those to whom it must pay benefits. It is consistent with this picture that a policy with such a company might contain a provision that there is no need to secure aid from any other person, such as a broker or insurance agent, in collecting the proceeds of this policy, and that the processing and investigation work will be done by the company itself.

By contrast, plaintiff's contention appears incongruous and unrealistic. Plaintiff would torture this phrase to say "whenever you want to pick a fight with me, feel free to go right ahead, for I will pay your expenses and attorney's fees." This would be a startling position for any human agency to take. It is simply out of place in an insurance contract. One could not expect the trial Court to favor or adopt such an *unreasonable* construction, and the district judge in this case did not! As pointed out by the Court below (R. 81):

It is very unusual for an insurer to promise to pay attorney's fees in the event that a dispute with an insured should lead to litigation; consequently the language creating such unusual liability ought to be clear and free from ambiguity. In the opinion of this Court the quoted language is not sufficiently definite.

That it would be unusual for an insurer to make such a promise is amply demonstrated by the fact that plaintiff could find no case involving such a promise in a setting like the present one. That plaintiff's construction is unreasonable can be seen by a contemplation of the nature of an insurance contract, and, in addition, is illustrated by contrasting plaintiff's attempted construction with the construction of a similar phrase by the Court in the *Brackett* case. Surely the lower Court did not err in rejecting a construction which was unreasonable and unrealistic when confronted with another interpretation that is both reasonable and obvious.

In any event, the patently reasonable construction by the lower Court should not be disturbed on appeal.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the District Court did not err with regard to its ruling on attorney's fees, and that, whether or not defendant should prevail on its appeal, plaintiff is not entitled to attorney's fees in this Court or in the Court below. The ruling of the District Court with regard to attorney's fees should be affirmed.

Dated, San Francisco, California,

Respectfully submitted,

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John Hancock Mutual Life
Insurance Company.*

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JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

Brief of Plaintiff as Appellee

and

Reply Brief of Plaintiff in Support of Cross-Appeal

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PAUL P. O'BRIEN, CLERK

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No. 15,619

In the

United States Court of Appeals

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JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellant,

vs.

MARY TROUTFELT COHEN,

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and

MARY TROUTFELT COHEN,

Appellant,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

Brief of Plaintiff as Appellee

In defiance of the express written obligation of a policy of life insurance, defendant has dragged the assured's widow through protracted litigation in the District Court, and now, after all ultimate questions of fact have been resolved against it by the findings, it resumes its attack here. In doing so, it makes statements having no support in the record and argues the case as if it were still in a trial court rather than a court of appeals.

STATEMENT OF THE CASE

The defendant is a life insurance company. Plaintiff is the widow and beneficiary of one Martin Troutfelt, hereafter called the assured. In 1939, defendant issued to the assured a 15 year endowment life policy of the face amount of \$5,000, including a Supplementary Provision for Family Income. The latter provided that the assured (should he live so long) would pay an extra premium for 15 years, in return for which defendant would pay his widow \$50 per month from the date of his death until the expiration of 20 years after the issuance of the policy, i.e., until 1959 (R. 36).

The assured accepted this policy, faithfully paid the stipulated quarterly premium of \$104.30 (R. 62) for 25 quarters, and died in 1945 (Findings 6, 13, R. 102, 104). The plaintiff then surrendered the policy, with all the attached supplements and applications, to defendant for a determination of her rights. With physical possession of all these papers and of its own records, defendant executed a new and further promise on the policy reading as follows:

“Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income, dated February 24, 1939, attached hereto.

John Hancock Mutual Life Insurance Company
By: Elmer L. French,
Secretary”

Defendant then returned the policy, so endorsed, to plaintiff (F. 10, R. 103).*

Defendant made the monthly payments to plaintiff through February 1, 1954 (F. 13, R. 104). Then, although there were still 5

*For some reason unknown to plaintiff, this endorsement has not been reproduced with the remainder of the policy at pp. 31-36 of the record. We ask that the Court consult the original policy which is in evidence (R. 124).

years to go, and 9 years after making the ratification and promise just quoted, 9 years after the husband's mouth was closed by death, and 15 years after the policy was issued, defendant notified plaintiff that it would make no more monthly payments and offered the \$5,000 face amount as full discharge of its obligations (F. 13, 14; R. 104).

Defendant thereby repudiated its obligation and committed an anticipatory breach of contract (F. 14, R. 105).

Its excuse is the claim that its own written policy was not its contract, that the figure 20 had been written in the Family Income provision by a clerk's mistake (R. 23), although it had never said so to the assured at all or to the widow prior to this repudiation (R. 43, 140). It argues that the "true agreement" of the parties was that the assured was to pay the extra premiums for 10 years, if he lived so long, although the policy specifies 15,* and that his widow should receive only 15 years of family income protection, although the policy specifies 20.

The foundation of defendant's excuse lies in the fact that, in applying for the policy, the assured signed an application form for the family income supplement (R. 37, 61). Item 11 on the form read, "Term of the Supplementary Provision years" with the notation under the blank "Insert 10, 15 or 20". Item 14 read "Premium to be paid for years" with the notation under the blank, "Insert 5, 10 or 15". All blanks in the forms were filled out in handwriting, except that the assured's name, the numeral "15" in item 11, the numeral "10" in item 14, and the amount of premium were inserted in typewriting (R. 37, 61).

It will be noted that the policy as written, issued and delivered by defendant to, and accepted by, assured increased *each* period by 5 years—i.e., both premiums and family income were to be paid for 5 more years (R. 36).

*Since the assured died within 6 years, this argument takes nothing out of defendant's pocket.

Defendant admits that a contract of insurance *was* entered into between itself and the assured (R. 42, 127; D. Br. 12).^{*} But it argues that the contract was not in the terms of the policy which it issued and he accepted but in the terms *purportedly* stated in the application.

The District Court found the fact to be otherwise: it found the contract to be precisely as issued and accepted (F. 4, 5; R. 101, 102).

In essence, the prime question on appeal is simply whether the findings are unsupported by the evidence. As we shall see, a finding in favor of defendant would itself have been completely erroneous.

ARGUMENT

I. The Contract Found by the Trial Court Was the Only Contract or Agreement Entered into by the Parties. Moreover, it Was Ratified in 1945.

Defendant is compelled to admit that there was a contract between the parties, because (a) it accepted premiums for years, and (b) essentially its claim is one for reformation (R. 26), and there can be no reformation unless both parties actually reached a complete *mutual understanding*. As said in *Bailard v. Marden*, 36 Cal. 2d 703, 708, 227 P.2d 10, 13,

“if no agreement was reached, there would be no standard to which the writing could be reformed.”[†]

^{*}In order to avoid confusion between the parties, we use the notation “D. Br.” to refer to the green brief of defendant John Hancock entitled “Appellant’s Opening Brief.”

[†]Defendant labors an argument (D. Br. 19, et seq.) that to permit reformation it is not necessary that there be a prior enforceable contract but only that there be a prior accord or meeting of the minds. The law is that there must have been a “complete mutual understanding of all the essential terms of their bargain” assented to by both sides. 5 Williston on Contracts, (Rev. Ed., 1937) p. 4339; *Hayes v. Travelers Ins. Co.*, 93 F.2d 568, 570 (10 Cir.). It may be unenforceable because not in writing where writing is required by the Statute of Frauds or where the parties intend it to be reduced to writing, or because other subjects are intended to be covered in the final contract, but the parties must have “expressed agree-

Here, there was no proof of any such mutual understanding prior to the assured's acceptance of the insurance policy itself.

The fact, if it be a fact (see pp. 7-8 *infra*), that the assured's application for family income spoke of 10 years of premiums and 15 years of protection is irrelevant. It is no evidence, let alone compelling evidence, that the parties agreed to this. The application was not an agreement; there could be no agreement on those terms unless and until defendant agreed to them. This is obvious, both as a matter of law, and from the face of the application, for immediately above applicant's signature appear the words (R. 37):

"IT IS UNDERSTOOD AND AGREED * * *

B. *That any Supplementary Provision for Family Income which may be issued hereon shall take effect only if * * * it shall be delivered to and actually received by me and the first premium or instalment thereof actually paid while I am alive and in sound health, and that delivery and payment shall constitute an acceptance of the Supplementary Provision for Family Income and of all its conditions.*"*

At most the application was but an offer; and it was not accepted, for the policy as issued was then itself a counteroffer which ripened into a contract when the assured accepted it and paid the premiums. It was stipulated that none of the persons authorized to bind the defendant ever communicated to the assured that it agreed to the terms of the application (R. 132), and there is no evidence that even an unauthorized agent did so. Defendant's responses to plaintiff's request for admissions numbered 9 and 10 constitute, as a matter of law, an admission that there was no such communication (R. 28, 42). Defendant intended to remain *wholly uncommitted* until it not only decided *whether* it would enter into an agreement but *what* agreement would be satisfactory to it. It made

ment and *an intention to be bound* in accordance with the terms that the court is asked to establish and enforce." 3 Corbin on Contracts, Sec. 314, p. 464.

*Throughout this brief all emphasis is supplied.

no communication with assured before sending him the policy sued on (R. 136). When the policy was delivered to the assured, he had the choice of either accepting or rejecting it. 29 Am. Jur., Insurance, § 155. He did precisely what the application provided he should do to enter into a contract, viz., he accepted it and paid the premium. No authorized agent of defendant ever informed the assured that he would not have to pay the premiums for 15 years, as provided in the rider (R. 28, 139), and there is no evidence that even an unauthorized agent did so.

The case is similar to *Metropolitan Life Ins. Co. v. Banion*, 106 F.2d 561 (10 Cir.), where the policy provided, as does the policy in suit, that the application was "a part" of the contract (p. 566):

"But an insurance company may make a binding contract of insurance by issuing and delivering the policy and accepting the premium upon it, even though the insured applied for a different kind of policy. The issuance, delivery, and acceptance of the policy, and the payment, acceptance, and retention of the premium can constitute an enforceable contract of insurance despite the fact that it departs in some respects from the policy outlined in the application."

In *Metropolitan Life Ins. Co. v. Whitler*, 172 F.2d 631 (7 Cir.) the court said (p. 633):

*"an application for life insurance itself is not the contract, but is a mere offer or proposal for a contract of insurance. It is merely a step in the creation of the insurance contract. 29 Am. Jur. p. 152. And where the insurance company tenders a policy at variance with the application, the tender constitutes a counter-offer, and upon acceptance of the policy by the insured, there is a meeting of the minds and the policy becomes the contract between the insured and the insurance company (citations) * * * even where an application is made a part of the policy and there is an irreconcilable conflict between the application and the policy issued, the provisions of the policy control" (citations)*

In short, either the Supplementary Provision, *as written by defendant*, is the contract, or there never was any contract at all. There is no in between situation. There is not a shred of evidence that the parties ever agreed to anything other than the 15 and 20 year arrangement set out in the policy as written.

THERE IS NO EVIDENCE THAT ASSURED INTENDED OR AGREED TO REDUCE HIS WIFE'S PROTECTION.

Thus far we have assumed, for the argument, that the assured in fact applied for a 10 and 15 year arrangement. But this is an unestablished assumption.

There was no evidence of the oral negotiations between the assured, who was dead, and the defendant's soliciting agent. Defendant failed to call either the witness to the application or the agent (R. 37), although preparatory to trial defendant interviewed him (R. 132). Thus defendant's argument is a superstructure resting on a pure *assumption* that the numerals "10" and "15" were in the application when the assured signed it, although these were patently typed into blank spaces, whereas the other blanks were filled in by longhand (R. 61).

While defendant's clerk Lawton (R. 157) testified that these blanks were filled in before signature (R. 172), his credibility was a question for the trial judge, who was not required to believe him. R.C.P. Rule 52; *Hayes v. First Nat. Bank of Fairbanks*, 192 F.2d 393, 394 (9 Cir.); *Sun Life Assur. Co. of Canada v. Stacks*, 187 F.2d 17, 20 (7 Cir.). In view of the findings it must be inferred that the court disbelieved him. *Standard Oil Co. v. Moore*, F.2d at, CCH Trade Reg. Rep. ¶ 68,861 (9 Cir., No. 14,927; Nov. 6, 1957) slip. opinion, p. 7. And there were excellent reasons why the court should have disbelieved him:

1. Lawton had no personal knowledge of the subject. He neither prepared nor knew where the paper had been prepared (R. 171, 186). His testimony was an attempt to *reconstruct* by speculation what had happened, on the basis of some correspond-

ence he had last seen, if at all, 16 years before, the contents of which he could not recall (R. 188, 189), and which was not produced.

2. The policy was issued in 1939. But it supplanted another issued earlier in the same year. The earlier one was a 20-pay life policy, but in the same face amount of \$5000 and with the same family income supplement requiring payment of premiums during assured's lifetime for 15 years and providing 20 years of income payments (D. Br. 4). The assured applied to convert this to a 15 year endowment policy, and as part of that application signed the application for the family income supplement (R. 37). The earlier policy called for premium payments of \$66.60 per quarter (R. 66, 162). The later one provided for premium payments of \$104.30 per quarter (R. 62). In merely changing from a 20-pay life to a 15 year endowment policy, no reason appears why the assured should have wanted to reduce his widow's income protection by $\frac{1}{4}$ (from a maximum 20 years to a maximum 15 years) in the very course of increasing the premium obligation by over 50%. The trial court was entitled to infer that he did not do so. Any reasonable inference to sustain the findings of fact must be drawn. *Standard Oil Co. v. Moore*, F.2d, CCH Trade Reg. Rep. ¶ 68,861 (9 Cir., Nov. 6, 1957).

The burden of establishing that the application had been filled out before signature was on defendant. Plaintiff relies on a contract formed by the assured's acceptance of the policy issued and delivered to him by defendant. It is defendant who argues that something else was agreed to; the burden of establishing every element of that contention by clear and convincing evidence rested on it.

IN 1945 DEFENDANT RATIFIED AND MADE A NEW PROMISE TO PAY THE POLICY AS WRITTEN.

It is admitted (R. 41, 126) and found (F. 10, R. 103) that in 1945, upon her husband's death, plaintiff surrendered the entire

policy to defendant as part of her claim and proof as beneficiary. *This* was the time when defendant was called upon to decide what its obligations were under the very supplement here sued on. Defendant's brief asserts that its purpose in calling for the policy was to furnish the beneficiary with a written record that the policy had been processed for payment (D. Br. 26). In its "Brief of Cross-Appellee in Answer to Cross-Appeal", in attempting to escape a warranty on which plaintiff claims an amount of damages measured by attorney's fees, defendant construes the warranty there involved as imposing the obligation "when facts occur that relate to [a] policy * * * [to] investigate and tell [the beneficiary] if these facts entitle you to payments" and to "help [the beneficiary] to perfect [her] claims and rights under the insurance contract" (Brief, p. 4).

In this posture, and with all the documents before it, defendant endorsed the policy and returned it to plaintiff. The endorsement placed thereon read (F. 10, R. 103):

"Insured died June 28, 1945. Settlement in accordance with Supplemental Provision for Family Income dated February 24, 1939 attached hereto."

This endorsement does *not* state that defendant is to pay "in accordance with the application", or in accordance with some unwritten meeting of the minds of the parties. It points to a *specific* document dated February 24, 1939 which plainly provided for a 20-year period.

Consequently, it is irrelevant whether anybody made a mistake in 1939, six years earlier. The defendant's new act of 1945 ratified the family income supplement *as written*. An insurance company, like anyone else, can ratify what purports to be its contract. 44 C.J.S., Insurance, § 273; 29 Am. Jur. Insurance § 98. No consideration is necessary to make the new promise and ratification binding. 1 Corbin on Contracts § 228; Restatement of Contracts § 89; 2 C.J.S. Agency, § 43; 2 Am. Jur. Agency § 210. The only

requirement is that the insurer know what it is doing at the time or have "the equivalent of knowledge, such as an opportunity to acquire information" (44 C.J.S., Insurance p. 1089); Restatement of Contracts § 93.

The District Court *found* that *when plaintiff surrendered the policy* in 1945 "defendant thereupon had the opportunity to read and should have read said policy" (F. 10, R. 103). Defendant does not attack this finding,* and it has never claimed or offered any evidence that any mistake was made *in 1945* or that it did not actually then read the entire policy. As quoted by this Court with approval in *Fidelity & Guaranty Fire Corporation v. Bilquist*, 108 F.2d 713, 716 (9 Cir.):

"Appellant is presumed and is required to know the provisions of the insurance contract, as it would any other written contract into which it enters. It will not do for appellant's vice president to say that he did not read the policy. Whether he or any of the other officers or agents of appellant read the policy is immaterial. It was appellant's duty to read the policy, and the law states that that was done."

Accord: *Hayes v. Travelers Ins. Co.*, 93 F.2d 568, 571 (10 Cir.); *Palmquist v. Mercer*, 43 Cal. 2d 92, 98, 272 P.2d 26, 30.

DEFENDANT'S OWN ARGUMENT THAT THE CONTRACT IS AMBIGUOUS REQUIRES AFFIRMANCE.

Defendant argues that the unequivocal promise to pay during a period of 20 years, in consideration of assured's paying premiums for 15 years, is "ambiguous", because inconsistent with the application (D. Br. 12). As we have seen, the application is no measure of the parties' contract. But even apart from that, the argument administers the coup de grace to defendant.

It is elementary that if the application is deemed part of the contract, and if there is a conflict between the policy and the

*Cf. Defendant's Designation of Points (R. 219) and its Specification of Errors (D. Br. 7).

application, the provisions of the policy control. *Aetna Life Ins. Co. v. Phillips*, 69 F.2d 901, 904 (10 Cir.); *Horning v. Lindsay*, 169 F.2d 963, 964 (D.C. Cir.).

Defendant quotes a headnote from *Castellina v. Vaughan*, 11 S.E. 2d 536, 122 W.Va. 600, for the proposition that the application controls. But a reading of the case shows the law of West Virginia to be that control is given to whichever document benefits the insured. E.g., *Logan v. Provident Sav. Life Assur. Soc.*, 50 S.E. 529, 57 W.Va. 384. This conforms with the elementary principle that any uncertainties or ambiguities in contracts of insurance must be resolved most strongly in favor of the insured, including resolution in favor of the greatest indemnity or coverage. *Continental Casualty Co. v. Phoenix Construction Co.*, 46 Cal. 2d 423, 437, 296 P.2d 801, 809, and numerous cases there cited.*

"The policy should be read as a layman would read it and not as an attorney or an insurance expert might read it." *Hobson v. Mutual Benefit H. & A. Association Inc.*, 99 C.A. 2d 330, 333, 221 P.2d 761, 763. The Supplementary Provision for Family Income plainly states that the income is to be paid for 20 years after 1939. Imagine a layman, with a written promise before him of 20 years' payments (*in numerals 1/4 inch high*), "construing" this promise with the application and concluding that 20 "meant" 15! But, in fact, the "experts" read it just as the assured read it. Defendant's execution of the promise in 1945 to pay in accordance with the Supplementary Provision (see pp. 8-10, *supra*) was a construction that the policy meant just what it said.

Defendant argues (D. Br. 13) that where an ambiguity exists, the court has a "preliminary job of construction" and to that end

*Defendant also cites *Bass v. Occidental Life Ins. Co.*, 142 Pac. 798, 19 N.M. 193. The case is not in point. There, a blanket policy was issued by the insurer to the employer covering those employed by it as miners. To determine whether plaintiff was so employed and therefore covered, it was necessary to refer to the written contract between the employer and plaintiff employee. Both contracts were essential to the existence of the cause of action.

“parol evidence and the history of the transaction and any other relevant circumstances should be examined”. True, but the court received the evidence defendant offered, and in that situation construction is a question of fact, and the trial court’s finding is conclusive unless clearly untenable. *Estate of Rule*, 25 Cal. 2d 1, 152 P.2d 1003.

We submit that the foregoing wholly disposes of the case. The following discussion summarizes further reasons why the judgment should be affirmed, and answers other arguments of defendant that belong in a trial court.

II. There Was No Mutual Mistake, or Any Form of Mistake Permitting Reformation or Constituting a Defense, or Mistake at All.

Based on the abstrusities of its private rate schedules, defendant argues that it made a mistake. But it is the external manifestation or expression of mutual assent which creates an agreement. Restatement of Contracts § 20. As stated by the Restatement of Contracts § 503, comment a,

“There is a contract formed by the acceptance of an offer even though the offer is made under a mistake * * *. The objective appearance of his acts is controlling * * *”

The record shows only one such manifestation—defendant’s offer of a contract in the terms of the written policy and the assured’s acceptance.

To permit one to escape or reform the contract, the mistake relied on must be either mutual, or a mistake of one party which the other at the time either knew or suspected. Cal. Civil Code § 3339; *Goodfellow v. Barritt*, 130 Cal. App. 548, 556, 20 P.2d 740, 743; *Miller v. Lantz*, 9 Cal. 2d 544, 548, 71 P.2d 585, 587; *Messner v. Mallory*, 107 C.A. 2d 377, 381, 236 P.2d 898, 900; Restatement of Contracts §§ 503, 504, 505. The burden is upon him who claims a mistake to establish it *by clear and convincing*

evidence. *Moore v. Vandermast, Inc.*, 19 Cal. 2d 94, 119 P.2d 129; *H. Moffat Co. v. Rasasco*, 119 C.A. 2d 432, 442, 260 P.2d 126, 133; *Franciscan Hotel Co. v. Albuquerque Hotel Co.*, 24 P.2d 718, 724, 37 N.M. 456; Restatement of Contracts § 511.

Thus defendant had to prove (1) not only a mistake on its part, but in addition (2) that the assured made the same mistake or knew that defendant had made a mistake.

A. THE FINDINGS.

Contrary to defendant's assertions (D. Br. 15), the District Court did *not* find that it made a mistake.* And most explicitly the court did find that the assured neither knew nor suspected any mistake, nor reasonably could or should have known or suspected one (F. 7; R. 102).

B. THE EVIDENCE SUPPORTS THE FINDINGS.

If, in the policy as issued, only the period during which income would be payable had been stepped up 5 years over the period inserted in the application, there might be more substance to a claim of clerical mistake. But the period during which premiums were payable was also stepped up. This alone warranted the trier of fact in concluding that the changes were deliberate on the part of responsible officers of the insurer, not a clerk's inadvertence.

Defendant merely introduced the testimony of a local clerk in San Francisco (R. 157) that defendant would never issue this kind of policy. This was a pure conclusion based entirely on defendant's rate book (R. 164, et seq.). But it was not the clerk's function to

*In its opinion, the trial judge stated that defendant made a mistake (R. 76) and thereafter at a hearing on the settlement of the findings referred to "a clerical mistake" (R. 199), but when it came to make its findings it made no finding of mistake (R. 100-105). The opinion of a trial court cannot be used to impeach the judgment, or to control or modify the findings on which it is based. *Isaacs v. De Hon*, 11 F.2d 943, 944 (9 Cir.); *United States v. Flower*, 108 F.2d 298, 301 (8 Cir.); *American Ins. Co. v. Lucas*, 38 F. Supp. 926, 938.

make such decisions. None of the numerous employees who *did* have that function and did pass on the policy saw anything in the policy as issued incompatible with defendant's rate structure.

The policy was written by defendant's agent "D. Mc. G." (R. 62). It was then checked by one "K.M.H.", who then turned it over to the policy registrar ("F.G.B.") who countersigned it for the defendant (R. 31). Thus, before the policy even left Boston, no less than three of defendant's agents had scrutinized it. *No one of these persons thought there was any mistake, saw anything unusual, or testified.* Indeed, by answer to a pre-trial interrogatory, defendant stated that it intended to rely on the testimony of F. G. Bowen, the policy registrar. (R. 46, 58, 59). But without any explanation, Bowen's testimony was not adduced by defendant, by deposition or in person. This silence was in itself "evidence of the most convincing character" that Bowen's testimony would have been unfavorable to defendant. *Interstate Circuit v. U. S.*, 306 U.S. 208, 226; *Hann v. Venetian Blind Corporation*, 111 F.2d 455, 459 (9 Cir.); Cal. C.C.P. § 1963(5).

Six years later the beneficiary sent the policy to the defendant for payment. Its Secretary wrote on it to pay "in accordance with the Supplementary Provision for Family Income." *Neither he nor anyone else who handled the policy at this time saw anything unusual, or testified.*

Moreover, the assured knew nothing about defendant's rate book, nor is it likely that any layman could have understood it had he known of it. The District Court itself remarked, "As a matter of fact, I doubt my ability to read the rate book accurately." (R. 166) Under the original 20 pay life policy issued in early 1939, the premium of \$66.40 per quarter was a construction of 5 items (R. 66). Under the substitute 15 year endowment the premium of \$104.30 per quarter was also a construction of 5 items (R. 62), some of which were greater and some less than the corresponding items on the earlier policy, although the total was greater. Even had he seen the constructions no layman could have

made heads or tails out of them so as to suppose that any facet of the premium was out of line with the coverage written.*

Repeatedly courts have rejected arguments of insurance companies based on their ratebooks and actuarial paraphernalia as expecting too much of laymen. E.g., *Metropolitan Life Ins. Co. v. Asofsky*, 38 F. Supp. 464; *National Fidelity Life Ins. Co. v. Gerard*, 52 P.2d 1, 175 Okla. 219; *New York Life Ins. Co. v. Dickensheets*, 193 P.2d 649, 165 Kan. 159.

Patently, the District Court was warranted in its finding.

C. DEFENDANT'S ARGUMENTS.

Defendant is driven to arguing that under New Mexico law, it is "irrelevant whether the insured knew or should have known" of the alleged mistake (D. Br. 17). We need not digress to consider whether New Mexican law applies, because the law of New Mexico is the same as the law everywhere else, i.e., a mistake must be mutual, not merely unilateral. *First National Bank v. Hartford Fire Insurance Co.*, 127 Pac. 1115, 17 N.M. 334; *Cleveland v. Bateman*, 158 Pac. 648, 21 N.M. 675; *Collier v. Sage*, 180 P.2d 242, 51 N.M. 147.

Defendant relies on *Point v. Wills*, 97 P.2d 374, 44 N.M. 31. But the court there first stated the settled principle as requiring mutual mistake, then quoted an argument urged by the insurer in that case, and then declined to apply that argument (p. 378). Defendant's brief merely quotes the losing party's argument as if it were the court's statement of law.

Moreover, defendant's argument rests on the assumption that prior to the issuance of the written policy the parties had come to an agreement, and that is a false assumption, as already seen.

*The basis of the conclusion of defendant's witness was his testimony that the extra premium on a family supplement with premiums payable for 15 years and affording 20 years protection was \$52.95 per annum (R. 165). The amount provided for in the policy from the assured was \$43.20 per annum (R. 33), a difference of \$9.75 per year or about 3 per cent of the total annual premium. It is this mote on which defendant bases its argument that the assured gave "no consideration" for the policy sued on (although he paid just what defendant told him to) and that his widow seeks a "windfall"! (D. Br. 24).

Defendant next argues (D. Br. 23) that even though it may not secure reformation, it can assert its own alleged mistake as a "defense", citing *Chaplin v. Korber Realty*, 224 Pac. 396, 29 N.M. 567. That case does not support the defendant, for it was a suit in equity for specific performance, and the mistake had occurred without negligence by one exercising the care and diligence which should be exercised by a person of ordinary care and prudence. In such a case the court held that specific performance of a bargain found to be harsh and inequitable would not be granted, because specific performance is an equitable remedy "not granted as a matter of course, or as an absolute right, like the right to recover a judgment at law", and that the parties would be left "to their remedies at law". Here plaintiff has sought no equitable remedy. She sued purely at law.

Here, too, if there was a mistake, defendant was negligent, and here, too, the shoe is on the other foot about harsh and inequitable conduct.

As said in *Royal Ins. Co. v. City of Morgantown*, 98 F.Supp. 609, 612,

"a court of equity will not relieve a party from a mistake caused by his own gross negligence. This principle is applicable in this case. To begin with, the policy was physically typed by an experienced agent of the company. It was checked in the Wheeling office * * * in the Charleston office * * * and by at least two in the home office of the company itself. Surely, somewhere along this line the mistake, if it was a mistake, should have been discovered."

III. Defendant's Counterclaim, as Well as Its So-Called "Defense", Is Barred by Limitations.

As defendant agrees (D. Br. 25), California law governs the issue of the Statute of Limitations. *Ragan v. Merchants Transfer Co.*, 337 U.S. 530. The specific statute is California Code of Civil Procedure, Sec. 338(4) whereunder a claim of mistake must be asserted within 3 years, with the exception that the claim is timely if the mistake was not "discovered" until within three years of suit.

To come within the exception the party asserting late discovery has a strict burden of pleading and proving not only late discovery but also facts excusing the delay. The rules are fully stated in *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698, 16 P.2d 268, and have been consistently applied in mistake cases. E.g., *Miller v. Lantz*, 9 Cal. 2d 544, 548, 71 P.2d 585, 587; *Johnson v. Ware*, 58 C.A. 2d 204, 207, 136 P.2d 101, 103; *Goodfellow v. Barritt*, 130 Cal. App. 548, 557, 20 P.2d 740, 744.

"Discovery" is a question of fact for the trial judge, *Uchida Investment Co. v. Inagaki*, 108 C.A. 2d 647, 654, 239 P.2d 644, 649, and here the District Court found that defendant discovered the mistake, if any, in 1939 or at the latest in 1945 (F. 12, R. 104). This finding disposes of the issue, unless defendant sustained its burden of proof so conclusively that the finding is clearly erroneous. In fact, a contrary finding would have been unthinkable.

A mistake, if any, occurred in 1939 when the policy was written. Not until 15 years later, in 1954, did defendant inform anybody of any claimed mistake (R. 43, 140) or assert it in this action (R. 18). The only evidence on the subject was that the policy was written, checked, and signed in 1939, and that defendant had the policy in its possession in 1945 and endorsed on it the promise to pay according to its terms. It conclusively follows that defendant read the policy in 1945 and is chargeable with full knowledge of its contents. *Fidelity & Guaranty Fire Corp. v. Bilquist*, 108 F.2d 713, 716 (9 Cir.), quoted at p. 10, *supra*.

Defendant offered *absolutely no evidence* respecting when, how or by whom the supposed mistake was discovered. None of the persons who had anything to do with the policy in 1939, or again in 1945, testified. As the trial judge observed, *nothing* was offered by way of excuse; there was simply *no* proof (R. 78). Defendant made no effort to sustain its burden. The assertions in its brief that it had no "actual knowledge" and that "the mistake came to light only when plaintiff refused to accept the final payment" (D. Br. 28) are gratuitous without the citation of any record references.

The gist of defendant's argument is that it had no "duty to investigate the terms inserted in the written copy of the insurance policy" or to pay any attention to what it read and solemnly re-endorsed! (D. Br. 29). This grotesquerie amounts to a claim that while the assured, a layman, is to be charged with knowledge that a policy issued to him in 1939 did not and could not mean what it said, the defendant through insurance experts is not to be charged with knowledge or comprehension of the same policy or its records! Unwittingly, defendant has destroyed its own argument. In the brief filed by it in answer to plaintiff's cross-appeal, it states (Brief of Cross-Appellee in Answer to Cross-Appeal, p. 4):

"The company *takes upon itself the obligation to investigate* the claim of the insured when it is given notice that such a claim exists.

* * * * *

"The provision * * * says in effect 'come to us, when facts occur that relate to your policy; *we will investigate* and tell you if these facts entitle you to payments * * *'"

By its own confession defendant *did* have the duty to investigate when in 1945 plaintiff made a claim and submitted the policy to defendant.

Defendant pleaded that it made discovery the moment a copy of the policy came into its hands in 1954 (R. 25). It could just as easily have done so when it had the policy itself *nine years earlier*. If it did not, it was guilty of gross negligence. As stated in *Beresford v. Horn*, 127 C.A. 2d 89, 92, 273 P.2d 302, 304:

"The law does not countenance indifference in such matters. It does not recognize ignorance which is due to negligence as an excuse for inaction."

To the same effect: *Messner v. Mallory*, 107 C.A. 2d 377, 381, 236 P.2d 898, 900.

Defendant cites *Mutual Life Insurance Co. of N. Y. v. Simon*, 151 F. Supp. 408 (S.D. N.Y.). The case is wholly dissimilar.

There the policyholder was alive and *conceded* that the sum payable should have been \$5,798.26 instead of the preposterous sum of \$57,093.28 as written; elaborate evidence was introduced respecting the preparation of the policy, including the testimony of the scrivener; and when the policy was in the hands of the insurer's local agency it was *not* for the purpose of determining what sum should be paid, but for the addition of riders which had nothing to do with the concededly erroneous provision. There the trial court found that the evidence "clearly established" that the insurer did not discover the mistake until shortly before suit. Here, the finding is that the discovery occurred no later than 1945.

THE BAR OF THE STATUTE OF LIMITATIONS APPLIES TO THE "DEFENSE" OF MISTAKE AS WELL AS TO THE COUNTERCLAIM FOR REFORMATION.

Defendant next argues (D. Br. 31) that although a suit or counterclaim for reformation for mistake may be barred, the statute of limitations never bars a defense on the ground of mistake. Defendant phrases the contention thus, that an insurer may "abide its time" and await suit (R. 150). But, bluntly, it means that an insurer may "lie in the grass"; it may solemnly issue and deliver its written promise to pay and, although it knows or learns of an alleged mistake therein, lie supine, accept the premiums year after year, await the insured's death, promise the beneficiary that it will pay "in accordance with Supplementary Provision for Family Income * * * attached hereto"—and then, 15 years after writing the policy, and 9 years after the insured's death, assert its claim of mistake!

Whatever may be the rule with respect to a defense that the plaintiff committed a fraud, this is not the rule when the defense is that defendant made a mistake. The difference is patent, for to sit silent after knowledge of one's own mistake is to acquiesce, to ratify, to waive.

The authorities are clear. When a defendant seeks to vary the terms of a contract, when sued on it, by setting up mistake, plain-

tiff may invoke limitations. *Miller v. Lantz*, 9 Cal. 2d 544, 71 P. 2d 585; *Bradbury v. Higginson*, 167 Cal. 553, 140 Pac. 254; *Sanders v. Sanders*, 117 Cal. App. 231, 3 P.2d 599.

In *Sanders v. Sanders*, supra, affirming a judgment for the plaintiff for amounts provided in a contract, the court said (117 Cal. App. at 233, 234, 3 P.2d at 600):

"The question present for determination is, therefore, whether a plaintiff may invoke the statute of limitations against an affirmative defense based on allegations of mistake, wherein the defendant is seeking reformation and cancellation of the instrument sued upon, *the contention of defendant herein being that a party may bide his time and, when enforcement is sought against him, interpose such defense and obtain such relief, regardless of lapse of time.* The decision in the case of *Bradbury v. Higginson*, 167 Cal. 553 [140 Pac. 254] evidently holds to the contrary, and in our opinion is decisive of this appeal."

Defendant rests on *Bank of America v. Vannini*, 140 Cal. App. 2d 120, 295 P.2d 102, a *fraud* case which quotes only enough from 1 Witkin, California Procedure, 601 to dispose of that case. Reference to Witkin shows that he is speaking of "defenses which render the contract *wholly unenforceable*". There are two different kinds of cases involving mistake. In the one, either there is a contract in the exact terms as written or, because of mistake, there never was any contract at all. In that situation reformation is not obtainable (see page 4 supra), and mistake, like fraud, or failure of consideration, may be set up as a defense at any time, for the defense is "no contract". But there is another kind of mistake, where it is admitted that there *was* a contract of some terms, but it is claimed that the wrong terms were written. In that kind of case there was no defense at law, but equity gave the remedy of reformation. In the reformed procedure adopted in the Code states and later in the Federal Rules of Civil Procedure, where law and equity are merged, the defense of mistake in that kind of case is

merely a shorthand procedure to obtain reformation. But if reformation is barred, so is the "defense", for the reform of procedure did not alter substantive rights. Thus, in *Bradbury v. Higginson*, 167 Cal. 553, 140 P.2d 254, an action on a written lease for rent, the tenant's answer alleged that by mistake a certain covenant had been omitted from the lease. Judgment was rendered for plaintiff on demurrer to the answer because of limitations prescribed by Cal. Code of Civil Procedure § 338(4). The court said (167 Cal. at 557, 140 Pac. at 255):

"The reformation of contracts is a branch of the equity jurisdiction. Under the old system, where legal and equitable rights were administered in different tribunals, the equitable remedy would have had to be sought and obtained in a court of chancery in a suit instituted for that purpose. Under our procedure, however, equitable defenses may be interposed to legal causes of action, and a right to equitable relief, affecting the legal right asserted in the complaint, may be set up by answer. *But if the matter set up be an equitable cause of action, the answer must contain all the averments essential to the statement of a cause of action as such (citing cases). If the defendant's right to obtain the equitable relief sought is barred by limitation, the plea of the statute may be interposed to the attempted defense just as it might have been in case the relief had been sought by an independent action* * * *"

Sanders v. Sanders, 117 Cal. App. 231, 3 P.2d 599, made the same distinction (117 Cal. App. at 235; 3 P.2d at 600):

"Defendant has also cited a number of cases adhering to the well-established rule that in actions to enforce agreements the statute of limitations may not be invoked against the defense of fraud. (*Estate of Cover*, 188 Cal. 133.) Of course, in such cases, the defense of fraud may be interposed at any time, and, if established, renders the instrument *void and unenforceable from the beginning*. *But our attention has not been called to any case wherein the same rule has been applied to an affirmative defense based on mistake* * * *"

IV. Defendant's Claim Is Barred by the Incontestability Clause of the Policy.

The policy contains the following clause on "Incontestability and Limitations" (R. 31):

"This policy, except any supplementary provision hereof granting any benefit for total and permanent disability, or granting any additional insurance specifically against death caused by certain bodily injuries sustained through accidental means, shall be incontestable after it has been in force during the lifetime of the Insured for two years from its date of issue, except for non-payment of premium, and except that if the Insured's age has been misstated the amount payable hereunder shall be that which the premium paid would have purchased at the correct age.

"If the Insured shall die within two years from the date of issue of this policy by self-destruction, while sane or insane, the amount payable hereunder shall be limited to the premiums paid hereon."

This Court has squarely held in *Richardson v. Travelers Insurance Co.*, 171 F.2d 699 (9 Cir.) that an incontestability clause precludes the insurer from asserting a claim of mistake so as to defeat recovery. And the facts of the present case illustrate the wisdom of the *Richardson* rule, for, as there stated (p. 701):

"[T]he origin of the clause may be found in the competitive idea of offering to policyholders assurance that their dependents would be the recipients of a protective fund *rather than a lawsuit.*"

The *Richardson* decision has been criticized along lines argued by defendant below, that it was not contesting against the terms of the policy, but for or in favor of its terms. There may be types of cases where that argument has some substance.* But here

*E.g., if a policy provides that coverage shall be adjusted if the insured has misstated his age, or that liability is limited in case of suicide, the insurer may show the true age or self-destruction, *New York Life Ins. Co. v. Hollender*, 38 Cal. 2d 73, 237 P.2d 510; *Stean v. Occidental Life Ins. Co.*, 24 N.M. 346, 171 Pac. 786. In such cases, the insurer is simply standing on the policy *as written*.

defendant can point to no provision of the policy stating that income stops after 15 years. On the contrary, the policy expressly provides for income for 20 years. The defense here is a contest *against* the terms of the policy as written.

The rule that insurance policies are construed against the insurer applies to an incontestability clause as to all others. *Dibble v. Reliance Life Ins. Co.*, 170 Cal. 199, 210, 149 Pac. 171, 174. Couple this with the elementary principle, *expressio unius est exclusio alterius*, for the incontestability clause provides that it shall not apply to a number of situations, carefully spelled out, but it does not specify that it shall not apply to claims of mistake. It follows that defendant may not contest on grounds of mistake.

V. The Doctrine of Anticipatory Breach Applies to This Case.

Defendant asserts (D. Br. 9) that the doctrine of anticipatory breach has no application to a contract for installment payments of money.

On the contrary, in every California case where the issue has been squarely presented, recovery on the basis of anticipatory breach has been allowed. E.g., *Caminetti v. Pacific Mutual Life Ins. Co.*, 23 Cal. 2d 94, 142 P.2d 741; *Guitron v. Rodriguez*, 105 Cal. App. 513, 288 Pac. 134.

In the *Guitron* case, affirming a judgment for plaintiffs, the court said (105 Cal. App. at 514; 288 Pac. at 134):

"On this appeal the appellants insist that the action was premature because the contract called for monthly payments and these payments were not due at the time the suit was filed. In answer the respondents rely upon the well-settled rule that when the repudiation of an executory contract results in a violation of the contract '*in omnibus*' the injured party may treat the entire contract as at an end and sue for damages for the breach. (6 R.C.L., pp. 1024, 1025; 6 Cal. Jur., pp. 464, 465.)"

In the *Caminetti* case, the court said (23 Cal. 2d at 104; 142 P. 2d at 745):

"It [the insurer] cannot perform under the non-cancellable [life insurance] policies it had issued. They have been in effect cancelled. The situation is thus analogous to a *breach by anticipatory repudiation*. Anticipatory breach is recognized in California. (6 Cal. Jur. 457.) *Upon the repudiation the promisee may immediately bring an action for future damages.*"

Defendant rests on the Restatement of Contracts, Para. 318, comment e, 12 Cal. Jur. 2d, Contracts, Para. 250, and *Cobb v. Pacific Mutual Life Ins. Co.*, 4 Cal. 2d 565, 51 P.2d 84. But the "statement of law [in texts] is no sounder than the cases that are cited to support the text" (Mr. Justice Peters, in 22 Cal. State Bar Journal, 175, 182). The cases cited in Cal. Jur. are the *Cobb* case, *Brix v. Peoples Mutual Life Ins. Co.*, 2 Cal. 2d 446, 41 P.2d 537, and *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724.

Flinn v. Mowry is not pertinent because it was not a case of anticipatory breach at all. Defendant there simply failed to pay one or more installments but did not in addition repudiate the obligation to pay future installments.

Both the *Brix* and *Cobb* cases were actions on a *disability* policy providing for monthly payments so long as the insured was "wholly and continuously disable[d]" and "suffer[ed] total loss of time" (2 Cal. 2d at 447, 41 P.2d at 538; similarly 4 Cal. 2d at 567, 51 P.2d at 85). Therefore, as the *Brix* opinion says (2 Cal. 2d at 454), the insured's right to future payments depended upon the continued existence at each date in the future of conditions precedent which, in the nature of things, could not be determined until that future time occurred.

"It is obvious that it [the failure to make a payment] does not work a breach as to the future benefits, since, as to such, the liability of the defendant has not become fixed, but

remains contingent upon the condition of the plaintiff being such as to enable him to demand them." (2 Cal. 2d 447 at 453, 41 P.2d 540-541).

In *Caminetti v. Pacific Mutual Life Ins. Co.*, 23 Cal. 2d 94, 142 P. 2d 741, involving *life insurance*, the court distinguished the *Cobb* and *Brix* cases, saying that they

"were concerned only with the question of the recovery of the payments that *might* become due *for continuance in the future of the existing disability*, as well as payments past due." (23 Cal. 2d at 104, 142 P.2d at 746).

Thus the *Caminetti* case, analogizing insolvency there to a present total repudiation, distinguished the case of an obligation to pay money which is unconditionally payable in the future from a case where the obligation to pay future installments is conditioned on the existence in the future of facts which might or might not occur. In the former the doctrine of anticipatory breach is applicable; in the latter, which is *Brix* and *Cobb*, it is not. Ours is the first type of case, for upon the death of the assured the obligation of the insurer became fixed, to pay plaintiff \$50 per month until 1959. Its obligation is not speculative or contingent, and defendant so concedes (D. Br. 9).

4 Corbin on Contracts, §§ 962, 968, 969, places the insurance cases in two groups: first, the case here—"those in which the insurer undertakes to pay a definite sum of money at a specified future time"; second, "disability and annuity policies, providing for periodic payments for an indefinite time, it being wholly impossible to determine in advance the total amount that may eventually have to be paid." With respect to the first group of cases, he says (p. 880):

"If the dicta to the effect that there can be no anticipatory breach of a unilateral contract were correct, there would be no right of action against an insurer for a repudiation in advance of the time for performance. Indeed, there are cases

holding in part on this ground, that an action will not lie for such a repudiation. In general, however, *it is well settled by ample authority that an action lies at once for an anticipatory repudiation by an insurer, either for the recovery of premiums paid or for damages,*" citing the *Caminetti* case among others.*

5 Williston on Contracts, p. 3742, gives the same explanation of the *Brix* and *Cobb* type of case.

*4 Corbin on Contracts § 967 also states:

"It is well established that the fact that a contract is entirely unilateral at the time of repudiation by the defendant is not in itself sufficient to deprive the injured party of an immediate right of action; this is true, even though the contract is a unilateral contract for the mere payment of money instalments in the future. The contract, even though unilateral, may be conditional upon some performance to be rendered by the plaintiff. If it is thus conditional, the cases hold that the plaintiff can maintain an action at once for the anticipatory repudiation, without performing the condition. It has been so held, even where the condition to be performed by the plaintiff is not any part of the agreed exchange for the performance promised by the defendant."

Here there still remains a condition to be performed by plaintiff. She must surrender the policy to defendant in Boston. (See the main policy, first paragraph, R. 31.)

Reply Brief of Plaintiff in Support of Cross-Appeal

On the cross appeal the issue is the construction of the warranty:

"It is not necessary to employ any firm or person to collect the proceeds of this policy."

Defendant argues that our construction will not "bear up under close scrutiny" (Brief of Cross-Appellee in Answer to Cross-Appeal, p. 2). But, as already noted at p. 11, *supra*, an insurance contract must be construed most strongly in favor of the insured and the beneficiary. If it requires "close scrutiny" to draw out of the language of the policy the kind of construction the insurer desires, that construction must be rejected.

Defendant's construction would convert the warranty into a pious and delusive nothing. Defendant says (Brief on Cross Appeal, p. 4):

"It says in effect 'come to us, when facts occur that relate to your policy; we will investigate and tell you if these facts entitle you to payments; we will aid you in filling out any applications and forms that are required; we will help you to perfect your claims and rights under the insurance contract. There is no need to secure aid from some other person in these matters, since as one of our services, we provide that aid ourselves.' "

Thus the beneficiary is to place herself in the insurer's hands. If the insurer should "tell" her wrongly that she had no rights, or that she is entitled to less than is legally hers, then, according to defendant, the beneficiary is out of luck. What a magnificent gesture on the part of the insurer! The emptiness of such a covenant, so construed, is demonstrated further by the fact that here,

in 1945, when a claim *was* presented, defendant did investigate and did tell plaintiff that it would pay in accordance with the terms of the Family Income provision as written, but 9 years later repudiated what it then told.

The lengths to which defendant is driven in its argument is shown by the following arrogant passage from its brief (p. 5):

"Plaintiff would torture this phrase to say, 'whenever you want to pick a fight with me, feel free to go right ahead, for I will pay your expenses and attorney's fees.'"

If the beneficiary proves to be in error by losing her suit, of course she may not recover these items. But if the insurer's refusal to pay is established to be wrongful by judgment, it should pay under its warranty.

CONCLUSION

In *Kaufman v. New York Life Insurance Co.*, 172 Atl. 306, 315 Pa. 34, the court said:

"If a policyholder cannot rely upon the face of his contract but must be continuously apprehensive of the fact that at the end of 20 years, he may be told a mistake had been made in the amount of capital upon which he came to rely, far more injury will result to the companies and the public than will be occasioned by requiring this defendant to stand the consequences of its own mistake." (172 Atl. at 309)

We submit that defendant's conduct has been high-handed, outrageous, and inexcusable, in refusing to honor its policy, in forcing plaintiff to litigation, in advancing a multitude of baseless arguments, and in taking an appeal from a judgment resting so thoroughly on findings of fact.

We submit that the judgment against defendant should be modified to allow recovery of damages measured by plaintiff's attorney's fees and expenses and otherwise affirmed, and that if necessary to reimburse plaintiff's expenses, such as the cost of printing briefs,

defendant should be taxed for a frivolous appeal under Rule 24(2) of this Court.

Respectfully submitted,

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Dated: January 14, 1958.

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No. 15,619

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellant,

VS.

MARY TROUTFELT COHEN,

Appellee,

and

MARY TROUTFELT COHEN,

Appellant,

VS.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

FEB 17 1958

PAUL P. O'BRIEN, CLERK

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No. 15,619

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellant,

VS.

MARY TROUTFELT COHEN,

Appellee,

and

MARY TROUTFELT COHEN,

Appellant,

VS.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

INTRODUCTION.

Despite Appellee's attempt to becloud this case with diversionary arguments, it is nonetheless clear that one basic issue pervades and governs the entire controversy. That issue is, simply: What was the agreement actually entered into by the two contracting parties.

Appellant's case consists of a demonstration of what that agreement really was plus an explanation of the two alternative routes which were available and should have been utilized by the trial Court to give effect to that agreement. Appellee's case consists of a writing which Appellee asserts is the embodiment of the agreement, but which contains within itself a discrepancy that neutralizes its effect. This simple truth should be recalled as the Court considers each of the various obstructions thrown up by Appellee in an effort to prevent the true contract from being enforced.

ARGUMENT.

- I. APPELLEE'S TRANSPOSITION OF THE ANTICIPATORY BREACH PROBLEM TO THE END OF HER BRIEF DOES NOT IN THE LEAST ALTER ITS IMPORTANCE OR ALLOW HER TO SLUFF OFF THE TRIAL COURT'S ERROR. THE LAW IS CLEAR THAT THE DOCTRINE OF ANTICIPATORY BREACH CANNOT BE APPLIED IN A CASE LIKE OURS WHERE THE CONTRACT HAD BECOME UNILATERAL IN PERFORMANCE, ALL CONTINGENCIES HAD BECOME RESOLVED, AND ONLY INSTALLMENT PAYMENTS OF MONEY REMAINED TO BE PERFORMED. THE TRIAL COURT, THEREFORE, HAD NO AUTHORITY TO INCLUDE IN ITS JUDGMENT THOSE INSTALLMENTS WHICH WERE NOT YET DUE OR OWING TO PLAINTIFF.

Appellee does not dispute the facts relevant to this issue. Thus, Appellee concedes that the only obligation which remains under this contract—if *there be any obligation*—is the obligation of the insurance company to pay money in installments. There is no performance called for by plaintiff. There remain no

contingencies or conditions which will affect the amount or the time of payments. All risk elements of the normal insurance or annuity contract have disappeared. The contract has been transformed by previous event into a simple contract for the payment of money in installments for consideration already paid.

Under such circumstances, the doctrine of anticipatory breach cannot be applied. And Appellee has failed to refute this point.

Thus, the *Restatement of Contracts* clearly states that the doctrine of anticipatory breach is unavailable here (See Section 318, and particularly Comment e). Williston likewise recognizes this as the prevailing rule of law (*Williston on Contracts*, Rev. Ed. § 1328), as does *Federal Law of Contracts*, §§ 446, 449. See also, 12 *Am. Jur. Contracts*, § 394.

Thus, in *Cobb v. Pacific Mutual Life Ins. Co.*, 4 Cal. 2d 565, 51 P. 2d 84, the California Supreme Court states at page 573:

“There can be no anticipatory breach of a unilateral contract. (Williston on Contracts, vol. III, § 1328.) In volume 1, Restatement of Contracts, California Annotations, section 318, the rule is thus stated: ‘In unilateral contract for payment in installments after default of one or more no repudiation can amount to an anticipatory breach of the rest of the installments not yet due.’ (Citing a list of California decisions.) *It is also the law that a bilateral contract becomes unilateral when the promisee has fully performed.* In the case at bar the promisee had fully per-

formed. He was exempt from future performance so far as dues or assessments were concerned. The fact that he was required or requested to submit to reasonable future medical examinations or furnish an occasional health report is too trivial and inconsequential to be regarded as an unperformed obligation on the part of the insured. He was therefore within the exception stated in the rule which holds *that no repudiation can amount to an anticipatory breach of the rest of the installments not yet due.*" (Emphasis added.)

The same rule of law is stated and relied upon in *Brix v. People's Mutual Life Ins. Co.*, 2 Cal. 2d 446, 453, 41 P. 2d 537, and the numerous cases cited therein.

Appellee has failed completely to establish the inapplicability of this rule of law.

First, Appellee vainly attempts to limit the applicability of the *Cobb* and *Brix* cases, *supra*, to disability insurance cases. But the decisions plainly approve and adopt the rule quoted above.

Second, Appellee falsely asserts that the *Caminetti* case, 23 Cal. 2d 94, is a *life* insurance case, and therefore differs from the *Cobb* and *Brix* cases. But the most cursory reading of the *Caminetti* case shows that it involved *disability* insurance.

Third, Appellee ignores the entire purpose and expressly stated reason for the holding in the *Caminetti* case. For the Court expressly pointed out that it was

allowing full recovery against the insurance company because it was *insolvent* and in the *process of liquidation*. It characterized the insolvency situation as being *analogous* to a breach by anticipatory repudiation. It then said that unlike the *Cobb* and *Brix* cases, *supra*, the *Caminetti* case involved the issue of damages for “total repudiation . . . where it is *beyond the power of the insurer to respond in the future for future damages.*” (23 Cal. 2d 94, 104.) In short, the interests of justice demanded that plaintiff be made secure because of a special fact—insolvency. And the Court went on to say at 23 Cal. 2d 110:

“For the foregoing reasons we believe that the measure of damages adopted by the commissioner is the correct measure of the amount to be allowed *disability* policyholders of the character involved *where the insurer becomes insolvent.* We do not express any views with respect to the proper measure to be used in life or disability policies where the insurer has repudiated a policy but is not prevented by insolvency from being *compelled to continue the insurance.*” (Emphasis added.)

Next, Appellee attempts reliance on the case of *Guitron v. Rodriguez*, 105 Cal. App. 513, 288 Pac. 134. However, that case does not discuss the question of anticipatory breach. It cites no cases as authority for its holding. It relies on a section of *California Jurisprudence* which makes no mention of anticipatory breach. It was decided in the District Court of Appeal and before the California Supreme Court cases we have discussed. And it most assuredly did not

involve life insurance, disability insurance, or any other kind of insurance contract.

Finally, Appellee quotes *in part* from *Corbin on Contracts*. However, Corbin concedes, in the section which is neither quoted nor mentioned by Appellee—4 *Corbin on Contracts* § 963—that the cases are contrary to his view!

The universally accepted rule, which refuses to apply the doctrine of anticipatory breach to contracts for the payment of money in installments that have become unilateral in performance, has been approved by the Supreme Court of the United States. *Smyth v. U. S.*, 302 U.S. 329, 59 S. Ct. 248; *Roehm v. Horst*, 178 U.S. 1, 20 S. Ct. 780. The *Smyth* case involved the obligation to pay money periodically on certain United States bonds. The United States Supreme Court observed as follows, citing as authority the *Restatement of Contracts* and *Williston*:

But the rule of law is settled that the doctrine of anticipatory breach has in general no application to unilateral contracts, and particularly to such contracts for the payment of money only.

Again, in *City of Hampton v. U. S.*, 218 F. 2d 401 (4th Cir. 1954), an award like that in the present case was involved. The contract in that case was for the borrowing of money, and provided that it should be repaid in 40 equal annual installments. The money was loaned, and the obligation to repay was subsequently repudiated. The creditor brought suit and was given judgment by the trial Court for the full amount

of the debt. On appeal, the judgment was modified by excluding therefrom the payments that had not become due and owing under the terms of the contract. The Court of Appeals reasoned as follows (p. 405):

As the contract had been fully performed on the part of the United States and all that remained to be done under the contract was the payment of money in instalments by the City, recovery of instalments past due would give plaintiff the full measure of reparation to which it was entitled at the time of the institution of suit. (Citing authority.) Whatever be the rule with respect to other contracts, it is clear, under the authorities, that for breach of a contract for the payment of money in instalments, where the contract is unilateral or has become unilateral as the result of performance by the complaining party, the right of recovery is limited to the instalments due at the time of institution of suit. (Citing authority.) Of course, the effect of a judgment for the past due instalments is to establish the liability of defendant under the contract, as fully as if this were done by declaratory judgment; and on the principle of *res judicata* this will facilitate recovery on other instalments as they fall due.

. . . But the Government had no right under the law to recover the total sum of \$27,500 because, as we have seen, the contract, which was originally bilateral, had become unilateral by full performance on the Government's side, leaving only the re-payment by the City in instalments of the money advanced by the Government.

It is submitted that this case provides an exact hold-in on all of the pertinent facts of the present controversy.

The law of New Mexico is controlling on all substantive issues in this case, as is conceded by appellee. (Brief, p. 15 ff.) Although no New Mexico decision on this point can be found, it would be presumptuous indeed to assume that New Mexico law would be in any way contra to the universally accepted rule. Rather, it must be presumed that New Mexico law is in accordance with the great bulk of the established law in other jurisdictions, and that New Mexico would not apply the doctrine of anticipatory breach to a situation involving a unilateral obligation for the payment of money in installments.

The accepted rule, which refuses to apply the doctrine of anticipatory breach in our situation, gives to the Appellee the fullest protection of the Court and a complete performance of the contract obligations. There is no question of a need to relieve Appellee from future obligations on her part. She does not have to hold herself in readiness to perform anything, for all of her obligations have already been performed. No prejudice of any kind can result to her from thus holding the contract open and enforcing it by its terms. No need or justice appears in accelerating the payments provided for by the contract. Only those contract payments due and owing should have been awarded by the trial Court.

**II. AT THE VERY LEAST THERE MUST BE COMMUTATION
OF THOSE SUMS NOT DUE UNTIL A FUTURE DATE.**

Even should the doctrine of anticipatory breach be held applicable to our case, the judgment is still incorrect. The trial Court neglected to discount the time factor in computing the amount of the judgment. For no one will contend that \$50.00 in hand today is the equivalent of \$50.00 not in hand until two years from today. Yet this was the holding of the Court below. Its conclusions of law read as follows (R 106):

. . . defendant was obligated to pay to plaintiff \$50 on the first day of each month after the death of said Troutfelt in 1945 to and including, February 1, 1959, and thereupon to pay her the further sum of \$5000, and upon defendant's refusal to perform said contract and its anticipatory breach thereof, plaintiff became entitled to recover said sums totaling \$8,000 together with interest on delinquent monthly payments . . .

It is disclosed in the judgment that the first date for a monthly payment was March 1, 1954. There were thus 60 monthly payments of \$50.00 comprehended in the judgment. These were taken at their full value to produce the sum of \$3000.00, which was added to the further sum of \$5000.00 to produce the basic judgment amount of \$8000.00.

But this manifestly was error. There was no provision in the contract calling for an acceleration of payments, nor is there any principle of law which would produce this result. If as the Appellee contends judgment is to be given for the full amount of the

obligation remaining, including those monthly payments not yet due, and including the sum of \$5000.00 which will not become due until February 1, 1959, *then only the present value of these future payments can properly be awarded to plaintiff*. The time element involved in the case simply cannot be ignored. To do otherwise is to violate the principle that damages are intended to be compensatory only. 25 *C.J.S.* § 74, p. 567; 15 *Am. Jur.* § 26, pp. 419-420; anno., 77 *A.L.R.* 1439, 90 *A.L.R.* 1318, 105 *A.L.R.* 234.

Indeed, the necessity of commutation in this precise type of case is apparent from the very few cases erroneously employing the doctrine of anticipatory breach to contracts for the payment of money in installments. Such a case is *Commercial Travelers Casualty Co. v. Dymke*, 279 S.W. 2d 405 (Tex. 1955). The Court in that case awarded to plaintiff a judgment for 15 months payments under a disability insurance contract, applying the minority view utilized by Texas Courts, but in doing so observed as follows (p. 408):

However, the eleven monthly payments which had not accrued when the judgment was rendered should have been discounted at the rate of six per centum per annum from the time they would otherwise have been payable to the date of the judgment. *Pan American Life Ins. Co. v. Garrett*, Tex. Civ. App., 199 S.W. 2d 819.

A reading of the cited case indicates that the six per centum figure was chosen because that is the legal rate of interest in Texas.

California law also is in accord on the commutation point save only that the legal rate of interest in California is seven per cent instead of six. *Noble v. Tweedy*, 90 C.A. 2d 738, 747-748, 203 P. 2d 778.

And there is no dispute as to this Court's ability to remedy the error. For where an error of law has resulted in an incorrect computation of the judgment, the reviewing Court can make the proper computation and modify the judgment. *Feckenscher v. Gamble*, 12 Cal. 2d 482, 500; *Parnham v. Parnham*, 32 C.A. 2d 93, 98; *St. Paul Fire & Marine Ins. Co. v. Garza County Warehouse & Marketing Assn.*, 93 F. 2d 590 (10th Cir. 1938); *Phillips & Benjamin Co. v. Ratner*, 206 F. 2d 372 (2nd Cir. 1953).

Therefore, even if the trial Court had committed no error in applying the doctrine of anticipatory breach, and rendering judgment for future as well as presently owing payments of money, it still was and is required to commute all payments due subsequent to the date of judgment (March 20, 1957) to their present value.

III. APPELLEE ATTEMPTS TO STRIP THE ISSUES ON THIS APPEAL FROM THE REVIEWING COURT BY RELYING UPON THE RULE THAT QUESTIONS OF FACT ARE FOR THE TRIAL COURT. BUT THE ESSENTIAL FACTS HERE COME FROM UNDISPUTED DOCUMENTARY EVIDENCE AND FROM UNCONTRADICTED TESTIMONY. HENCE THE RULE IS INAPPLICABLE.

A. The evidence.

A review of the evidence demonstrates that with one exception it is entirely documentary, and that both

the documentary and testimonial evidence is uncontroverted by Appellee, and that there is no conflict as to the evidence. The bulk of this evidence is provided by the insurance policy itself, a document with *several* component parts. There are also in evidence the records kept by the insurance company relating to this policy. Finally, there is testimony identifying, explaining and establishing the chronology of these documents and the entries therein, given by the very person who was in charge of the company office that processed this insurance policy. This evidence reveals that on February 1, 1939, plaintiff's husband applied for a **20** payment life insurance policy with a **20** year family income rider. (R. 64.) A few months later, on May 31, 1939, he applied for a converted policy, requesting a change be made to a **15** year endowment-family income policy. (R. 63.) The company then sent to him their regular family income application form, with his name, the number "15" in as the term of the family income provision and the number "10" in as the number of years premiums would be payable *already typed in*. This fact was provided by the testimony of the witness Lawton (R. 172-173), the individual who supervised the processing of the policy in question. (R. 157-158, 161-162.) After this, on July 11, 1939, the **15** year family income application was signed by the insured and returned to Lawton's office. (R. 173.) This application, as well as the one that preceded it, *both* specified 15 years as the term of the family income provision. *Both were physically attached to and made a part of the insurance policy.* (R. 37.) The

premium for the policy was set out and broken down into component's right on the face of the policy. (R. 33.) The amount of the premium for the family income provision was shown on the face of the policy to be \$43.20, the correct amount for a fifteen year family income provision. (R. 33.) The amount of the premium set out on the face of the original policy, the one calling for a 20 year family income provision, had been \$52.95. (R. 66.) Both of these figures were on the *face* of their respective policies, in the most conspicuous place available, so that they *could be seen without even removing the policy from its envelope*. (R. 166-167.) It was also shown that the insurance company does not retain carbon copies of the standard printed form portion of the policies which it issues, but maintains its records by use of the application portion of the policy instead. (R. 177-178.) Thus the insurance company did not have access to the standard printed form except on two subsequent occasions; the first in 1945 when the insured died and the policy was sent to the home office and stamped for settling (R. 103, F. 10); the second occasion was when this dispute arose.

This then is the evidence in the present case. There was offered no conflicting documentary evidence and no conflicting testimony by Appellee. Indeed there is no conflict in the evidence, no dispute as to the relevant facts, *as conceded by Appellee at the trial*. (R. 154.) The only remaining questions are the legal effect and significance to be given to these undisputed facts, and the legal principles which will govern the

remedies sought by Appellant and Appellee respectively. In such a situation the role of the Appellate Court is in no way stilted by the restrictive rule of review relied on by Appellee.

B. The controlling legal issue—intent.

The controlling issue in this case, regardless of the means by which it is approached, is what was the mutual intent of the contracting parties. Whether the Court chooses to work through the medium of reformation or through the medium of construction, this issue is primarily the same; namely, what was the agreement on which the contracting parties came to a meeting of the minds. The dispute in the present case involves one term of the contract only. That term is the number of years that payment should be made under the family income provision of the contract. Appellant contends and the evidence shows without contradiction that the parties agreed on 15 years. Appellee contends that this term is properly represented by the number "20." *Both* figures appear upon the face of the policy; and although the trial Court found in favor of Appellee, this finding must now be reversed in light of the uncontradicted evidence.

C. Appellant's case.

In support of its position that the mutual intent of the parties was to insert in the disputed provision the number "15" Appellant points to the following evidence: The insured on May 31, 1939, in the very first correspondence pertaining to the converted policy, sent to the insurance company a document re-

questing that his 20 year insurance coverage be changed to 15 year insurance. In this document, signed by the insured, under the heading "Specifications for New Policy," there was inserted the words "15 Yr. End.-F.I. Provision," wherein "End." stands obviously for Endowment and "F.I." stands obviously for Family Income. Still later, the company's regular application form was sent to the insured by the company, *after* the company had typed thereon the number "15" in the space provided for term of the supplementary provision. The number "15" was obviously taken from the previous document, in compliance with the instructions of the insured as to the type policy he wished to have. The insured *then* signed this second document on July 11, 1939, and returned it to the company. This passing back and forth of correspondence not only demonstrates in the strongest way just what the intention of the parties was in regard to the term of the family income provision, but it also served to *focus their attention* on the very part of the contract that Appellee has sought to defeat. The formal policy was then issued by the insurance company and the number "20" was inadvertently inserted in *one portion* of the policy as the term of the family income provision. However, the other two documents just mentioned were physically attached to the policy and incorporated therein *by express reference*. This *entire* document was then sent to the insured.

D. Appellee's case.

Contrasted with the detailed proof set out above, Appellee (and the trial Court) rests his case on one point only: the presence of the number "20" as the term of the family income provision on *one portion* of the insurance policy. Appellee asserts that the "policy" itself specified the 20 year term. But this, as we have seen, is at best a half truth. The term provision appears in *three* places throughout the policy; in one of these it is represented as "20" years, *but in two of these places it is represented as "15" years*. Appellee therefore can hardly expect to support her position through the policy itself.

The insurance policy in this case is a composite document. In addition to the basic endowment feature, it contains a disability rider, a double indemnity rider, a family income rider, the original application for insurance of February 1, 1939, the original application for a family income rider of the same date, the application for a converted policy of May 31, 1939, and the family income application in respect of this policy, dated July 11, 1939. All of these parts were physically affixed to each other and constituted in fact and in law one entire policy or contract. Thus, it is stated on page one of the document that "*This policy and the application herefor constitute the entire contract between the parties . . .*" Appellee can therefore not lay claim to the support of the "policy." Appellee is attempting to extract one fraction of a composite whole and set it up as determinative of the

whole. But the absurdity of this effort is apparent from the contradictions contained within the policy itself. And it is for this reason that Appellant is entitled to and relies most heavily on the preliminary correspondence, which was focused on this disputed provision, as showing the objective manifestations of the true intent of the parties.

Appellee attempts to bolster her case by an alleged inference that the insured did not intend to reduce his wife's protection from the 20 year period in the original policy to the 15 year period of the converted policy. (Brief of Plaintiff as Appellee, p. 8.) We are enjoined that all reasonable inferences in support of the judgment below must be drawn. But it is submitted that such an inference is entirely unreasonable and contrary to proven facts. Such an inference is not only unreasonable but impossible in view of the May 31, application for a "15 Yr. End.-F.I. Provision" *and* of the July 11 application which was preceded by correspondence culminating in the insertion of the 15 years in an application and its later execution by Troutfelt.

Appellee suggests that the number 15 might have been inserted in the application of July 11 after this application had been returned to the company. (Brief, p. 7). Appellee asks this Court to presume and asserts that this Court is bound to presume that the trial Court disbelieved the witness Lawton who testified to the contrary. For this extreme proposition, Appellee relies on R.C.P. Rule 52 and several cases applying that rule. Rule 52 merely provides that

“due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses.” But this is a far cry from what Appellee urges upon us here. The cases of *Hayes v. First Nat. Bank of Fairbanks*, 192 F.2d 393; *Sun Life Assur. Co. of Canada v. Stacks*, 187 F.2d 17; *Standard Oil Co. v. Moore*, 9 Cir., No. 14,927, Nov. 6, 1957, cited by Appellee, all involved situations where the evidence was in *conflict*, either because two witnesses testified to opposite and mutually exclusive facts or because the testimony of a witness was inconsistent with other established facts in these cases. In such a situation the trial Court obviously was compelled to consider conflicting evidence.

In contrast to this situation, the testimony of the witness Lawton was not contradicted by any other testimony. It was not inconsistent with the established facts of this case, but on the contrary, is substantiated by undisputed and documentary evidence. There is first the fact of the application of May 31, specifying a change to a “15 Yr. End.-F. I. Provision.” There is secondly the fact of the two applications for the converted policy, for which no other explanation is possible. In addition to this support from the other evidence, the witness Lawton possessed the highest qualifications as a witness in his own right. He was in charge of the office which processed this application. His testimony was based on recollection, supported by past experience and by regular entries in business files. (R. 161-162, 189.) There is simply no basis for disbelieving him. His testimony was un-

controverted by testimony or any other evidence, and was fully borne out by independent documentary evidence in the case. In this situation, the correct rule is just the opposite from that urged by Appellee. As stated by the Court in *U. S. v. Johnson*, 208 F. 2d 729, 730 (5th Cir. 1953):

The evidence of the witness Jones . . . was unimpeached and uncontradicted, and its credibility was in no manner brought into question. This being so, the district judge could not reject his testimony or find contrary thereto.

Of course, this whole issue of credibility is based on a mere assumption of Appellee. We do not for a minute believe that the trial Court disbelieved the witness. *There is no indication in the findings or the opinion that the Court at any point questioned the witness's testimony.* We must therefore regard as fully established the fact that the application of July 11 had previously been in the hands of the insurance company, where the number "15" was inserted as the term of the family income provision; that it was subsequently sent to the insured who completed filling it out and returned it to the company; and that the number "15" appeared on this document from start to finish as a clear indication of the intention of *both* of the contracting parties.

E. The applicable rules of review.

Appellee would ask this Court to ignore the substantive issues of this case because of the fact that the trial Court made findings of fact. He relies on the

familiar rule that findings of fact are binding on the Appellate Court if they are supported by the evidence. Appellant submits, however, that the findings of fact regarding the mutual intent of the parties *are not supported* by the evidence in this case, and that as a matter of law such findings must be overturned. This would follow from the fact that the only evidentiary support for the findings is the appearance in one part of the policy of the numeral “20”, and that this support is completely neutralized by the appearance in two other parts of the policy of the numeral “15”. In contrast to this, is the detailed correspondence relied upon by Appellant to show that the intended term was “15”.

But in addition to this, the rule of review cited above is not applicable to the situation presented by this case. Rather, a much less strict rule, one which gives far more discretion and latitude to the reviewing Court, is properly applicable here. That rule provides that where there are no contradictions in the evidence or where the facts are not disputed or where the evidence is substantially documentary, the reviewing Court is not bound by the findings of the trial Court. This proposition is set out and applied in *Fargo Glass & Paint Co. v. Globe American Corp.*, 201 F. 2d 534, 536 (7th Cir. 1953) as follows:

Since the evidence material to the issues involved consists mainly of documents, depositions, answers to interrogatories and requests for admissions and oral testimony, which is almost entirely uncontroverted, the findings of fact entered

by the District Court are not absolutely binding on this court.

A similar expression has been given in *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.*, 178 F. 2d 541, 548 (9th Cir. 1949), in commenting as follows on R.C.P. Rule 52:

“As a corollary to this rule, we may make our own inferences from undisputed facts or purely documentary evidence.”

See also *Murphy v. U. S.*, 179 F. 2d 743 (9th Cir.); *Home Indemnity Co. v. Standard Accident Ins. Co.*, 167 F. 2d 919, 922-923 (9th Cir. 1948); *Western Union Tel. Co. v. Bromberg*, 143 F. 2d 288, 290 (9th Cir. 1944). The evidence in the present case clearly fits within the requirements of this rule of review. It is primarily documentary. There is oral testimony from one witness. Both the documentary and the testimonial evidence is uncontradicted by any other evidence. All items of the documentary and testimonial evidence are consistent with each other and derive mutual support from each other. There is no conflict in the facts or in the evidence offered in proof of those facts. Hence, the findings of the trial Court should not be considered binding on this Court, but instead this Court should exercise its own discretion.

IV. BASED ON THE FOREGOING SET OF FACTS, AND UNDER THE APPLICABLE NEW MEXICO LAW, APPELLANT HAS CLEARLY ESTABLISHED ALTERNATIVE GROUNDS ON WHICH RELIEF CAN PROPERLY BE GRANTED BY THIS COURT.

Appellee has conceded that New Mexico law must govern the substantive issues of this case. (Brief, p. 15.) A survey of New Mexico law reveals two theories which fit the facts of the present case and which afford to Appellant the relief which it seeks. These grounds for relief are first, construction of the contract and, second, reformation on the grounds of a scrivener's error.

A. Proper construction of the contract requires that the judgment be reversed.

Appellee concedes that relief can be given by way of construction of the contract. (Brief, pp. 11-12.) Appellee does not contest the applicability of the New Mexico case of *Franciscan Hotel Co. v. Albuquerque Hotel Co.*, 24 P. 2d 718, wherein construction was used to give effect to the real intent of the parties, relying on evidence of the same nature as the evidence presented by Appellant in the present case. Instead, Appellee again attempts to remove the issue from the scope of this appeal by arguing that the construction of the trial Court is binding on this Court, citing *Estate of Rule*, 25 C. 2d 1, 152 P. 2d 1003.

Appellant contends, as before, that the evidence in this case is so overwhelmingly against the position of Appellee that this Court should, as a *matter of law*,

reverse the construction of the Court below. Appellee, and the trial Court, can muster in their support only one item of evidence—the one portion of the insurance policy on which the number “20” appears as the term of the family income provision. In contrast, Appellant points to the remaining portions of the same policy, plus the correspondence between the contracting parties on the very provision in dispute, all of which show that a scrivener’s error occurred and that the parties intended to contract for a 15 year term.

But it is not necessary to a decision for Appellant that this Court be able to reverse the trial Court’s construction as a matter of law. For the restrictive rule of *Estate of Rule* has no application to the situation presented by this case. The situation in the *Rule* case was one involving conflicting and inconsistent oral evidence. The situation in the present case involves primarily documentary evidence, supplemented by the testimony of one witness, and all the documents and the testimony stand uncontradicted and mutually consistent. The rule of review properly applicable to such a case is given by *Estate of Platt*, 21 C. 2d 343. This case lists at page 352 three types of cases in which the construction of a contract given by the trial Court is treated merely as a decision of law, properly reviewable in an Appellate Court. Among these types is the case where there is no conflict in the evidence. The *Platt* case itself appears to belong to this type, and thus applies the rule it describes. And in *Moffatt v. Tight*, 44 C.A. 2d 643, 648, the Court observed as follows:

The plaintiffs further contend that the issue being an interpretation of a written instrument the holding of the trial court must be accepted by this court. . . . But where, as here, there is no conflict in the evidence, the question presented is solely a question of law and a court of review is bound to determine it accordingly.

Similarly, in *United Artists Corp. v. Strand Productions*, 216 F. 2d 305 (9th Cir. 1954) the Court observed as follows (p. 310):

And the case being one essentially for construction of language within the four corners of the instrument, the appellate court is free to interpret the contract without indulging presumptions as to the interpretation below. As logic, the conclusions are entitled to serious consideration, but the appellate court is not bound thereby.

The evidence in the present case, being mainly documentary, and being entirely uncontroverted, falls within the scope of the *Platt* rule. This Court should therefore render a construction of the contract that will give effect to the mutual intent of the contracting parties, as disclosed by the undisputed evidence of the case.

Appellee next relies on an assertion that in the process of construction, the policy must control over the application. For this proposition four cases have been cited by Appellee. But Appellee's own cases demonstrate that the law is not as she has contended. *Aetna Life Ins. Co. v. Phillips*, 69 F. 2d 901 and

Horning v. Lindsay, 169 F. 2d 963, cited on p. 11 of Appellee's brief, were cases in which the record contained no indication of the intent of the parties. No issue of mistake was raised. No proof of the meeting of the minds of the parties was made. No evidence as to the mutual intent of the contracting parties was presented. But these are not the circumstances of the present case.

It is surely the basic principle of all contract law that the Court should try to give effect to the intent of the parties. This is amply proved by Appellee's cases of *Metropolitan Life Ins. Co. v. Banion*, 106 F. 2d 561 and *Metropolitan Life Ins. Co. v. Whitler*, 172 F. 2d 631, cited on p. 6 of Appellee's brief. In these cases, evidence *was* available as to the mutual intent of the parties. The ultimate holding in these cases was that the terms as contained in the policy should prevail over the terms as contained in the application, *but the reason for this holding was that the former terms expressed the mutual intention of the parties*, as clearly shown by the evidence. This basic rule of contract law is further demonstrated by Appellant's case of *Castellina v. Vaughan*, 11 S.E. 2d 536 (W. Va.), where the terms of the application for insurance were held to prevail upon a finding that these terms, and not the terms of the policy, expressed the mutual intention of the contracting parties. Appellee's assertion that this case was decided upon the principle of construing the contract against the insurer (Brief, p. 11) is in utter disregard of the language of the opinion, and is rendered ridiculous by the fact that

the insurance company in that case was in the position of a mere stakeholder.

Appellee argues that the policy should be read as a layman would read it, and that her case is thereby established. (Brief, p. 11.) But such a devise is only a guide to the intent of the contracting parties. And the true intent of the contracting parties has been amply proved by the exchange of correspondence with the so-called layman concerning the insertion of a 15 year term. Nor is there any dispute that in ascertaining the intention of the parties, great weight should be given to the application for insurance. *Bass v. Occidental Life Ins. Co.*, 142 Pac. 798 (New Mexico); *Point v. Wills*, 97 P. 2d 374 (New Mexico). It is the duty of this Court to construe the contract before it in such a way as to give effect to the mutual intention of the contracting parties. The uncontradicted evidence clearly demonstrates that this intention was to provide for a 15 year term for the family income provision, and the contract, taken as a whole, should be held to so read.

B. In any event the judgment should be reversed to enable reformation of the contract.

The law of New Mexico on the subject of reformation, conceded by Appellee to be applicable (Brief, p. 15), is not open to dispute. The basic premise for the granting of this relief under New Mexico law is a finding that there was a prior agreement or meeting of the minds by the contracting parties which expressed their true desire. *Collier v. Sage*, 180 P. 2d 242; *Point v. Wills*, 97 P. 2d 374; *Franciscan Hotel*

Co. v. Albuquerque Hotel Co., 24 P. 2d 718; *Cleveland v. Bateman*, 158 Pac. 648; *First Natl. Bank v. Hartford Fire Ins. Co.*, 127 Pac. 1115. If this be shown, and the departure from the agreed-upon contract is caused by a scrivener's error, it matters not whether the error was mutual or unilateral. *Point v. Wills, supra*. Appellee's contention (Brief, p. 15) that this doctrine was rejected by the Court in *Point v. Wills* is completely unfounded. The Court refused to grant reformation, but the reason for doing so was that the doctrine set out above was held inapplicable to the facts of the case. It was held that no scrivener's error had in fact occurred. The vitality of the principle of law applicable to scrivener's errors was in no wise impaired.

Appellee again seeks refuge behind the ruling of the trial Court regarding the intention of the parties, and attempts to avoid the argument as follows (Brief, p. 15):

Moreover, defendant's argument rests on the assumption that prior to the issuance of the written policy the parties had come to an agreement, and that is a false assumption, as already seen.

On the contrary, Appellant has conclusively established this agreement by uncontroverted documentary and testimonial evidence.

In any event, it is apparent that the insured must have known of the mistake. The only evidence on this issue is provided by the documents in the case. This documentary evidence shows that the premium for the original policy and the premium for the converted

policy were conspicuously displayed on the policies, in such a fashion that they could be seen without removing the policy from its envelope. The premium for a 20 year family income rider was thus displayed on the original policy, and the amount of that premium was \$52.95. *This document was in the hands of the insured*, and the most cursory inspection would have disclosed to him this figure. The converted policy recited in the same manner, a family income premium of \$43.20. There is an obvious one-quarter reduction in premium amount, which obviously would correspond to a one-quarter reduction in the length of the term—from 20 years to 15 years. It is probable that the insured never believed that the converted policy called for a 20 year term. But if he did notice the discrepancy in years, he could not help knowing that a mistake had been committed. The evidence on this issue is entirely documentary and is entirely uncontroverted. It is thus well within the province of the reviewing Court.

Appellee cites three cases to show that an argument based on premium rates should be rejected by this Court. (Brief, p. 15.) But two important distinctions make those cases inapplicable to the present case. The object in all three of the cited cases was the reformation of the premium amount, and the insurer's case consisted merely of proof that an incorrect amount had been charged. Secondly, there was no contention or proof made with regard to mutual intent of the contracting parties. In the present case, the item to be reformed is the term of years, and Appel-

lant has conclusively proved the mutual intention of insurer and insured. In addition, the insured had before him in black and white, in a conspicuous position, the premium amount that properly corresponded to the 20 year term.

Appellee finally contends that as a proposed witness of the insurance company was not called to testify, and no explanation thereof was given, this should constitute adverse evidence "of the most convincing character." (Brief, p. 14.) This bold assertion overlooks the fact that an explanation was given (R. 155-157), that the witness in fact called was the person in charge of the processing of this application (R. 157-158, 161-162), and that no manner has been suggested in which the proposed witness might have added anything of significance to the testimony of the person who actually processed this application.

Appellant has conclusively established all essential facts necessary to entitle it to reformation, both under the law of New Mexico and under the law which Appellee asserts applies everywhere else.

V. APPELLEE SEEKS TO INJECT AN ILLUSORY OFFER AND ACCEPTANCE THEORY INTO THE CASE.

Appellee has given a legalistic description of the contract in the present case, in which she describes the applications of the insured as offers and the issuance of the policy as a counteroffer. The case of *Metropolitan Life Ins. Co. v. Whitler*, 172 F. 2d 631, is cited in an attempt to show that such an analysis

should control the disposition of this case. (Brief, p. 6.) Quite the contrary, however, Appellee's own case demonstrates that such labels as "counteroffer" do not control the result of a case like the present one. The crucial finding in the *Whitler* case was that both contracting parties *intended* to name the beneficiary as set forth in the second of two documents; that there was a meeting of the minds on the identity of that named person. Without this basic finding as to mutual intent, any talk of offer or counteroffer is meaningless. And in the present case, it has already been demonstrated that the intention of the parties called for a 15 year term.

Nor is there any need to fix the precise moment at which a contract was established in order to apply the doctrine of reformation. For as conceded by Appellee, reformation does not require a prior and independent enforceable contract. (Brief, p. 4.) Indeed, the New Mexico case of *Franciscan Hotel Co. v. Albuquerque Hotel Co.*, *supra*, explicitly so holds. The test for reformation, as for construction, is rather whether there was an agreed or mutual intent.

VI. APPELLEE FAILS TO ESTABLISH AN ALLEGED RATIFICATION.

Appellee also talks much of ratification, pointing out the endorsement by the company subsequent to the mistake, as if that disposed of the problems of construction and/or reformation. Of course, it cannot do so. For actual or imputed knowledge of the true

situation is an essential element for any ratification to be legally effective, as is illustrated by Appellee's own authorities. (Brief, pp. 9-10.)

The trial Court made a finding that the insurance company did have knowledge of the mistake (Findings Nos. 10, 12), and presumably this finding was based on the principle of constructive knowledge. But this finding must be reversed, inasmuch as it was produced by the application of an incorrect theory of law respecting constructive knowledge. There is no dispute about the applicable rule of review in such cases. Findings of fact that are based on an incorrect theory of law or that are induced by an error of the law must be reversed on appeal. *U. S. v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525; *Smallfield v. Home Ins. Co. of N. Y.*, 244 F. 2d 337, 341 (9th Cir. 1957).

The error inextricably bound up in this finding is demonstrated in Appellant's Opening Brief, pp. 25-31. The trial Court relied on the proposition that the means of knowledge are the equivalent of knowledge. Possession of the insurance policy was therefore equated with knowledge of its contents. But in fact, the above proposition is not a complete statement of the law. Availability of the policy has no significance whatever unless there were circumstances which would compel a reasonable man to make an investigation. That this is the law can be ascertained from the very authority on which the trial Court relied. Nor does the authority cited by Appellee at page 10 of her brief in any way alter this legal principle. *Palmquist v.*

Mercer, 43 C. 2d 92, was a negligence action arising out of the hire of a horse, and is in no way applicable to the facts of the present case. *Hayes v. Travelers Ins. Co.*, 93 F. 2d 568, was an insurance case in which it was found that there was no scrivener's error or other mistake in drafting, but rather that the policy exactly expressed the mutual intent of the insured and the insurance agent. *Fidelity & Guaranty Fire Corporation v. Bilquist*, 108 F. 2d 713, from which Appellee quotes at length, contains the following statement at page 716:

The means of knowledge are the equivalent to knowledge. *A clue to the fact which, if followed up diligently, would lead to discovery, is in law equivalent to a discovery.* (Emphasis added.)

This is precisely the proposition for which Appellant is contending. Since the finding of fact resulted from this error of law, the finding of constructive knowledge must be reversed.

Appellee at one point complains that she was not notified sooner of the discrepancy between the bargain and the written policy. She seems to assume that the insurance company had actual knowledge of the mistake, and had neglected to advise her of it. This amounts to a presumption of bad faith. But such an assumption is contrary to all the evidence of the case, and is completely unwarranted. Indeed, the presumption is just the other way around, and no evidence was introduced which in any way rebutted this presumption of good faith and fair dealing. California Code of Civil Procedure, § 1963(19); *Stafford-Lewis v.*

Wain, 128 C.A. 2d 614, 621; *Hedden v. Waldeck*, 9 C. 2d 631, 636; *Michaels v. Pacific Soft Water Laundry*, 104 C.A. 366. In the latter case, the Court stated as follows (p. 368):

The presumption against fraud, . . . the presumption that private transactions have been fair and regular, and the presumption that the ordinary course of business has been followed (sec. 1963, subds. 1, 19 and 20, Code Civ. Proc.) are all *evidence* of good faith of the bank in this particular, and a contrary finding cannot stand without some evidence rebutting them.

As a matter of law, fairness and regularity and good faith must be held to be established by Appellant in the present case. The insurance company did not notify Appellee any sooner of the discrepancy for the simple reason that it learned of the discrepancy for the first time when Appellee sought her windfall payments.

Thus, Appellant had neither actual nor constructive knowledge of the discrepancy between the intended bargain and the portion of the policy relied upon by Appellee. Any discussion of ratification thereby becomes academic. The mere repetition of an ambiguity or an error does not by some magic cause the ambiguity or error to disappear. Any finding of the trial Court based on ratification or on the company's knowledge of the mistake is clearly contrary to the law and the evidence and must be reversed.

VII. APPELLEE VAINLY ATTEMPTS TO BRING THIS SUIT
WITHIN THE INCONTESTABILITY CLAUSE OF THE
POLICY.

Another argument advanced by Appellee is based on the incontestability clause of the insurance policy. *Appellee makes no contention that this clause should bar construction of the contract*, but does assert that it should bar reformation of a mistake. In support of her theory, she has cited one case, *Richardson v. Travelers Insurance Co.*, 171 F. 2d 699 (9th Cir.) But this case stands alone among a host of authority that declares that a suit for reformation for mutual mistake is not a contest within the meaning of the incontestability clause.

The inherent justice of the rule is apparent when one examines the leading case of *Columbian Natl. Life Ins. Co. v. Black*, 35 F. 2d 571 (10th Cir., 1929). In that case, the insured applied for an ordinary life policy. He paid premiums on an ordinary life policy. But the company mistakenly attached a second page to the policy, which second page provided for an endowment payment. At the end of twenty years, the insured sought to enforce payment of an endowment. The company, of course, asked for a reformation. The insured interposed pleas of no mutual mistake, acquiescence, negligence, laches, and the incontestability clause. The Court rejected all of these defenses, and at page 547 was quick to point out that the insured was entitled to no more than he had truly contracted and paid for, saying:

He [the applicant] applied for an ordinary life policy; without any quibble, and in response to

his application, he received a policy that manifestly was in error. He only paid for an ordinary life policy.

And, in rejecting the asserted defense of the incontestability clause, the Court said at page 577:

Both the policy applied for and the one issued provide, in substance, that "after one year from date hereof this policy shall become incontestable," save for non-payment of premiums. It is claimed that this provision bars this action [for reformation]. The contention is not sound. This is not a contest of the policy, but a prayer to make a written instrument speak the real agreement of the parties.

The incontestability clause is not intended to foist a contract or a liability upon the parties which they never intended to create. Instead, it is intended to assure the policyholder that the liability and contract which was *actually intended* will not be avoided or invalidated after the passage of a given period of time. The *Richardson* case relied on by Appellee has never been followed. It has been severely criticized. It has been referred to unfavorably in a subsequent California Supreme Court decision. And, in any event, the case construes contractual language clearly distinguishable from that in our case—a peculiar distinction which the Court in that case felt made the mass of contrary authority inapplicable.

That the *Richardson* case stands alone can be readily established by examining 45 *CJS*, Insurance, § 751, p. 769; 29 *Am. Jur.*, Insurance § 892; 7 *ALR* 2d 504;

1 *Appleman, Insurance Law and Practice*, § 337, p. 402, and the law review articles which comment upon it. That its reasoning is wholly inconsistent with the purpose and policy of incontestability clauses can be ascertained from reading the excellent criticisms of the case found, for example, in 62 *Harv. L. Rev.* 890, 97 *U. Pa. L. Rev.* 741, 33 *Minn. L. Rev.* 784, and 27 *Tex. L. Rev.* 861. The assurance that the case does not represent good California law will be found in the discussion of the California Supreme Court in *New York Life Ins. Co. v. Hollendar*, 38 C. 2d 73, 83. And the distinction between the language of the clause in the *Richardson* case and that in ours can be readily ascertained by reading the decision itself. In our case, the clause declares that the "policy" shall be incontestable. In the *Richardson* case, the clause stated that "*this contract shall be incontestable.*" And the *Richardson* opinion placed particular emphasis on this phrase in holding the universal rule inapplicable. It felt that the broader phrase, "*this contract,*" precluded any inquiry beyond the written policy itself. We do not agree with this reasoning nor do the writers who have exhaustively analyzed the decision, for the policy is only *evidence* of the contract (9 *Wigmore, Evidence*, § 2417.) Thus an attempt to show the true contract is not a contest of it, but simply the establishing of the essential agreement itself. Both construction and reformation are processes designed for enforcing a contract, not contesting it.

VIII. THE TRIAL COURT CLEARLY ERRED IN DENYING THE RELIEF AVAILABLE TO THE INSURANCE COMPANY BY INVOKING THE STATUTE OF LIMITATIONS.

Appellee asks the Court to ignore all substantive issues of this case because of the bar of the statute of limitations. *Of course the statute of limitations cannot bar relief by way of construction of the contract, and Appellee does not so contend.* The Court has an obligation to construe the contract whenever an action is brought on the contract. The power and obligation to construe are contemporaneous with the contract itself. Nor does the statute of limitations bar relief on the grounds of mistake when this mistake is asserted as a defense to an action, as in the present case. *Bank of America v. Vannini*, 140 C.A. 2d 120; *Gardner v. California Guaranty, etc. Co.*, 137 Cal. 71. This latter case involved a suit for reformation of a contract on the grounds of mistake. The Court observed as follows (p. 75):

The objections on the score of the statute of limitations are equally untenable. Under the provisions of the codes, the contract really agreed upon is regarded as the only contract between the parties, and this is to be interpreted according to their real intention as proven; nor is it necessary that it should be formally revised. . . . Hence, while the contract remains in force, and not barred by the statute, there can be no bar to the proof of the real intention of the parties or to the reformation of the contract.

But in any event, it is conceded that the applicable statute of limitations will bar nothing unless there has

been “discovery” of the mistake by the insurance company. The trial Court made such a finding (Findings Nos. 10, 12), and Appellee again relies on this finding as tying the hands of the reviewing Court. In fact, however, this finding is a nullity, inasmuch as it proceeded from a misconception of the applicable law. Where, as here, a finding of fact is induced by an error of law, the reviewing Court must reverse the trial judge. See discussion and cases cited *supra* at pp. 30-32. For a demonstration of the error of law committed by the trial Court in making this finding, see Appellant’s Opening Brief, pp. 25-31. The statute of limitations therefore does not stand in the way of this Court to give effect to the actual bargain made by the contracting parties.

IX. THE DECISION BELOW IS INCONSISTENT WITH THE TREATMENT GIVEN TO AN ALMOST IDENTICAL CASE BY A CALIFORNIA DISTRICT COURT IN A RECENT AND CAREFULLY CONSIDERED DECISION.

All of the points heretofore made by Appellant are confirmed by the recent case of *Flax v. Prudential Life Insurance Co. of America*, 148 F. Supp. 720 (S.D. Cal., Central Div., 1957). A brief survey of the facts, issues and holdings of that case will be presented here, although indeed the case is so close to the case at bar as to warrant a close reading of the entire opinion.¹

¹See also *Mutual Life Insurance Co. of N.Y. v. Simon*, discussed in Appellant’s Opening Brief at pp. 21-22, 30.

The *Flax* case involved a suit to recover money under a life insurance contract, with a counterclaim by the insurance company for reformation on the grounds of mutual mistake. The original policy was converted into a paid-up policy in 1936, at which time an endorsement or rider was attached to the policy showing the cash surrender value of the policy on various dates. The rider recited that these figures represented cash surrender value per thousand dollars of insurance. Actually the figures shown represented the total cash surrender value of the entire policy, and the incorrect description was the result of a scrivener's mistake. The company did not learn of the mistake until 1954, when it was processing a loan applied for by the insured. The insured opposed reformation on the grounds of an incontestability clause, the statute of limitations, and the law applicable to reformation and mutual intent in general.

The Court first held that the incontestability clause had no application to a suit for reformation. (p. 725.)

New York courts have held uniformly that incontestability clauses of the type inserted in this policy *do not* prevent a contest of the policy on the ground of fraud or mistake. . . . They take the view that when, either through mutual mistake or unilateral mistake by one party which is known to the other, the policy does not express the intention of the parties, reformation may be had either when an action is instituted by the insured to enforce its provisions or in a direct action brought by the insurer to make the policy speak verity.

The *Richardson* case, relied on by Appellee in the present case to reach a contrary result, was disposed of as follows (p. 726, fn. 6):

Richardson v. Travelers Ins. Co., 9 Cir., 1948, 171 F. 2d 699, 7 A.L.R. 2d 501, does not command a different conclusion. There, the federal court was interpreting a California policy, and, finding no California precedent, it held that the incontestability clause prevented reformation. The effect of this decision has been limited, if not entirely destroyed, by the decision of the Supreme Court of California in *New York Life Ins. Co. v. Hollender*, 1951, 38 Cal. 2d 73, 237 P. 2d 510, which must control us in interpreting California contractual law.

The Court in the *Flax* case was equally unimpressed with arguments based on the California statute of limitations. The Court suggests that one reason the *statute of limitations does not* apply is because of the defensive nature of the counterclaim for reformation of a mistake. (p. 726, fn. 8.) But in any event, it was held that there can be no bar to showing or *interpreting the true meaning of a contract*, as an incidental and preliminary step to enforcing the contract, so long as the contract itself is not barred (p. 727):

And it is a cardinal rule of federal equity jurisprudence that where it is sought to enforce a provision in a contract which was the result of remediable mistake, the mistake need not be asserted until action is sought on the instrument in which the mistake occurred. This, because the right to reform an instrument is co-existent with

the contract. So long as the contract is enforceable, the party against whom it is sought to enforce has the right to plead mistake and seek an interpretation of the instrument which would eliminate the clause inserted by mistake. This upon the ground that reformation is merely incidental to the ultimate relief sought.

Note that this is only one of the numerous grounds available to Appellant in the present case for avoiding the statute of limitations obstacle thrown up by plaintiff.

The *Flax* case discusses the principles of reformation and mutual intent relevant to this type of situation. It carefully distinguishes between a mistake of fact in the agreement and a mistake of a scrivener in reducing a valid agreement to writing. Numerous authorities are cited to show the Court's power to make the instrument speak the way the contracting parties mutually intended that it should, either by a decree of reformation or by enforcing the contract according to its true purpose and intent. Plaintiff in that case, as in the present case, had made an attempt to impute knowledge to the insurer. The Court observed that the policy was in the *exclusive possession of the insured, save for a few occasions* on which it had been sent back to the insurer for special purposes. *Mere possession by the insurer on these occasions was held not to constitute actual or constructive knowledge of the mistake*, nor to impose a duty on the insurer to investigate for a mistake. (p. 730.) The Court then summarized as follows (p. 730):

The plaintiff either did or did not know of the mistake. *If he did*, it appearing that the mistake *was not known* to the insurer, we have the type of unilateral mistake for which relief by way of reformation is granted. *If he did not know* the mistake, we have a case of mutual mistake for which reformation also lies.

Thus the fact that neither party in the present case noticed the mistake is not, as contended by Appellee, any impediment to reformation or construction. Rather, it is the very situation for which these remedies were designed.

The Court in the *Flax* case concluded with these observations (p. 731):

So, if plaintiff's present demands were allowed, he would receive something which he did not bargain or pay for,—something for nothing. . . . It would be neither good morals nor good law to sanction the application of such a policy to business relations.

On the other hand, a ruling for the defendant avoids a palpable injustice and still allows the plaintiff the full benefit of the contract *he and the company intended* to make.

These observations apply with equal force to the present case. Appellee's husband, the insured, did not intend, bargain, or pay for this extra period of payments which Appellee is now seeking. No prejudice can result to Appellee from enforcing the *true* contract. And by enforcing this true, bargained for, and intended contract, the Court can avoid the injustice of giving Appellee a windfall at defendant's expense.

CONCLUSION.

For the reasons stated, it is therefore respectfully submitted that the judgment of the District Court in favor of plaintiff should be reversed and plaintiff's complaint dismissed. Alternatively, the judgment of the District Court dismissing defendant's counterclaim for reformation should be reversed, and reformation granted. At the very least, that portion of the judgment of the District Court which gave plaintiff recovery for future installments of money, not yet due and owing, should be reversed, and in any event remanded for commutation.

Dated, San Francisco, California,
February 5, 1958.

Respectfully submitted,

HENRY C. CLAUSEN,
KEESLING & KEESLING,
WILLIAM H. KEESLING,

*Attorneys for Appellant
John Hancock Mutual Life
Insurance Company.*

No. 15619

United States
Court of Appeals
for the Ninth Circuit

JOHN HANCOCK MUTUAL LIFE INSUR-
ANCE COMPANY, a corporation,
Appellant,

vs.

MARY TROUTFELT COHEN, Appellee.

And

MARY TROUTFELT COHEN, Appellant,

vs.

JOHN HANCOCK MUTUAL LIFE INSUR-
ANCE COMPANY, a corporation, Appellee.

Transcript of Record

Appeals from the United States District Court for the
Northern District of California,
Southern Division

FILED

SEP 15 1957

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For John Hancock Mutual Life Insurance
Company, a corporation.

In the United States District Court, Northern
District of California, Southern Division

No. 33864-Civil

MARY TROUTFELT COHEN, Plaintiff,

vs.

JOHN HANCOCK MUTUAL LIFE INSUR-
ANCE COMPANY, a corporation,
Defendant.

EXCERPT FROM DOCKET ENTRIES

1954

July 12—Filed petition on removal with copy of
complaint and summons attached.

12—Filed bond on removal in sum of \$250.00.

* * * * *

July 27—Filed answer and counterclaim of defend-
ant.

Aug. 11—Filed request of plaintiff for admissions
by defendant.

* * * * *

Sept. 30—Filed response of defendant to request for
admissions.

* * * * *

Oct. 11—Filed interrogatories by plaintiff to de-
fendant.

* * * * *

Dec. 6—Filed reply of plaintiff to counterclaim
of defendant.

* * * * *

1954

Dec. 7—Filed answer of defendant to interrogatories by plaintiff.

1955

Feb. 9—Filed statement of plaintiff of admitted facts.

9—Ordered assigned to Judge Carter for trial this date. (Roche)

9—Court trial. Opening statements made, evidence and exhibit introduced, memos ordered filed 10-10-5 days and case continued to March 11, 1955 for submission. (Carter)

* * * * *

May 14—Filed memo order of Court. Prayer of plaintiff for attorney fees denied and plaintiff to recover balance of \$8000.00 due on policy of insurance with interest on all accrued but unpaid payments. Counsel to prepare findings, conclusions and judgment. (Carter)

16—Mailed copies order to counsel.

24—Lodged findings and conclusions of plaintiff.

24—Lodged judgment by plaintiff.

31—Filed proposed modifications of defendant to findings, conclusions and judgment.

June 24—Ordered after hearing on settlement of findings and conclusions, matter submitted. (Carter)

* * * * *

1955

June 29—Filed notice and motion by plaintiff to amend complaint, July 6, 1955.

* * * * *

July 6—Filed order permitting amendment to complaint. (Carter)

6—Filed amended complaint.

* * * * *

Nov. 10—Filed stipulation that answer of defendant be deemed amended to deny allegations of paragraph 13 of complaint and defendant reserves objections to order allowing plaintiff to file amendment.

* * * * *

1957

Mar. 20—Filed findings of fact and conclusions of law. (Carter)

20—Entered judgment—filed March 20, 1957—for plaintiff vs. defendant in sum of \$8000.00 plus interest at 7% per annum from date of entry of judgment together with costs. (Carter)

20—Mailed notices.

* * * * *

27—Filed notice of appeal by defendant.

28—Mailed notices.

27—Filed supersedeas bond in sum of \$10,000.00, "Approved this 27th day of March, 1957, Oliver J. Carter, United States District Judge."

April 1—Filed appellant's designation of record on appeal.

1957

April 8—Filed notice of appeal by plaintiff.

8—Filed appeal bond in sum \$250.00 by plaintiff.

8—Mailed notices.

9—Filed statement of Mary Troutfelt Cohen re designation of record.

19—Filed order extending time to docket appeal to June 24, 1957.

22—Mailed copies order to counsel.

[Title of District Court and Cause.]

PETITION FOR REMOVAL

To the Judges of the United States District Court
for the Northern District of California, Southern
Division:

The petition of John Hancock Mutual Life Insurance Company respectfully shows:

I.

On the 23rd day of June, 1954, an action was commenced against petitioner in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled Mary Troutfelt Cohen, Plaintiff, vs. John Hancock Mutual Life Insurance Company, Defendant, numbered 439325, by the service upon petitioner of a summons and complaint, copies of which are annexed hereto. No further proceedings have been had therein.

II.

The above described action is one which this

Court has original jurisdiction under the provisions of Title 28, United States Code, §1332, and is one which may be removed to this Court by petitioner, defendant herein, pursuant to the provisions of Title 28, United States Code, §1441, in that it is a civil action wherein the matter in controversy exceeds the sum or value of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs, and is between citizens of different states.

III.

Petitioner is informed and believes and therefore alleges that plaintiff, Mary Troutfelt Cohen, at the time this action was commenced, was and still is a citizen of the State of New Mexico, and defendant John Hancock Mutual Life Insurance Company, at the time this action was commenced was and still is a corporation incorporated under the laws of the State of Massachusetts and was not and is not incorporated under the laws of the State of California.

IV.

Your petitioner herein files and presents herewith a bond with good and sufficient surety in the penal sum of Two Hundred Fifty Dollars (\$250.00) conditioned as required by Acts of Congress on that behalf duly made and provided, that petitioner will pay all costs and disbursements incurred by reason of the removal proceeding should it be determined that this case is not removable or is improperly removed.

Wherefore, your petitioner prays that this cause

proceed in this Court as an action properly removed thereto.

KEESLING & KEESLING,
/s/ By WILLIAM H. KEESLING,
Attorneys for Petitioner.

Duly Verified.

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 439325

MARY TROUTFELT COHEN, Plaintiff,

vs.

JOHN HANCOCK MUTUAL LIFE INSUR-
ANCE COMPANY, Defendant.

COMPLAINT ON LIFE INSURANCE POLICY
AND FOR DECLARATORY RELIEF

Plaintiff Mary Troutfelt Cohen complains of defendant John Hancock Mutual Life Insurance Company and alleges:

1. Defendant is, and at all times herein mentioned has been, a corporation organized and existing under the laws of the State of Massachusetts and is, and at all said times has been, doing business in the State of California, has at all said times possessed and now possesses a valid and unrevoked certificate of authority issued by the Insurance Commissioner of the State of California to transact in the State of California life and disability insur-

ance and, as a condition precedent to admission to transact such business in the State of California, has filed in the office of said Insurance Commissioner a writing designating an agent for service of process in the State of California. The insurance policy hereinafter referred to was written through one of defendant's San Francisco agencies.

2. Martin E. Troutfelt died June 28, 1945. At all times herein mentioned prior thereto he and plaintiff were husband and wife.

3. As of February 24, 1939 Martin E. Troutfelt, as insured, and defendant, as insurer, entered into a written contract of life insurance on the life of said Martin E. Troutfelt, and plaintiff was named as beneficiary thereunder.

4. Said contract was represented and evidenced by defendant's policy No. 3223099, together with supplements attached thereto as a part of it. One of the supplements attached to said policy and contract and constituting a part thereof was and is a "Supplementary Provision for Family Income", a true and correct copy of which is attached hereto as Exhibit 1 and made a part hereof.

5. After the death of the insured, plaintiff delivered custody of said policy to defendant; on or about July 26, 1945, defendant thereupon read said policy and endorsed and executed on it a legend reading as follows:

"Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income, dated February 24, 1939, attached hereto.

John Hancock Mutual Life Insurance Company
By [Sig.] Elmer L. French, Secretary

Dated at Boston, Mass., July 26, 1945."

Thereupon defendant returned said policy, so endorsed, to plaintiff.

6. In and by said contract defendant agreed to pay to plaintiff a monthly income of fifty dollars (\$50) on the first day of each month following the death of the insured and continuing until and including the first day of February, 1959, if the insured should die prior to that date but after payment of the initial premium, and defendant further agreed to pay to plaintiff the additional sum of five thousand dollars (\$5,000) on the expiration of 20 years from February 24, 1939.

7. The insured, Martin E. Troutfelt, in consideration of the above promise by defendant, agreed to pay premiums as provided in said policy until the date of his death, and he did pay all said agreed premiums.

8. The insured duly performed all the conditions on his part agreed to be performed in and by said contract.

9. After the death of the insured defendant paid to plaintiff each month the sum of fifty dollars (\$50) to and including February 1, 1954.

10. Since February 1, 1954, defendant has failed and refused and continues to fail and refuse to pay any further monthly sum, and no further sum has been paid.

11. On or about May 13, 1954, defendant notified plaintiff in writing that it "does not consider it is

liable for any further monthly payments under the family income provision, but is only liable for final payment of \$4,993.59, which was due and payable on February 24, 1954. Immediately upon receipt of the policy contract, check for this amount will be sent to you''. Thereby defendant positively repudiated the contract and committed an anticipatory breach thereof.

12. An actual controversy exists between plaintiff and defendant. Plaintiff asserts that under said contract defendant is under the legal duty to pay to her, and plaintiff has the legal right to receive from defendant, the family income payments of \$50 per month for each and every month to and including February 1, 1959, in addition to the sum of \$5,000, and further asserts that in view of said anticipatory breach by defendant, plaintiff has the legal right to receive and defendant is under the legal duty to pay to plaintiff, forthwith, the said entire sum of \$8000. The defendant asserts that it is under no duty to make any further payments of family income to the plaintiff and further asserts that its only obligation to plaintiff is to pay the sum of \$4,993.59 and then only in the event plaintiff should surrender the policy and relinquish all rights to further payment thereunder.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$8000, plus interest at the legal rate until paid on the sum of \$50 from March 1, 1954, on the further sum of \$50 from April 1, 1954, on the further sum of \$50 from May 1, 1954,

and on the further sum of \$50 from June 1, 1954, for a declaration of the rights and duties of plaintiff and defendant under said policy and contract of insurance, for her costs of suit herein incurred, and for such other and further relief as may be meet and proper.

BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

Duly Verified.

EXHIBIT 1

Supplementary Provision for Family Income with
Benefit for Total and Permanent Disability,
Waiver of Premiums.

Issued by the John Hancock Mutual Life Insurance Company as a part of and attached to Policy No. 3223099 on the life of Martin E. Troutfelt.

If, after payment of the initial premium under the policy and this supplementary provision, and before default in the payment of any subsequent premium, the death of the Insured shall occur within 20 years from the date hereof, the Company, upon receipt of due proof on the Company's prescribed forms, of the death of the Insured, will, in lieu of immediate payment of the amount insured in one sum, pay to the beneficiary named in the policy, if living, or to such other beneficiary as may be finally substituted under the conditions of the policy, on the first day of each policy month following the death of the Insured, a monthly in-

Exhibit 1—(Continued)

come which shall consist of interest of \$2.46 per month per \$1000 of the sum insured plus an annuity certain of \$7.54 per \$1000 of the face amount of the policy, the last monthly income payment to be made on the first day of the policy month directly preceding the expiration of 20 years from the date of issue of this provision. Upon the expiration of the said period the Company will pay the amount insured plus any paid up additions or accumulated dividends to the credit of the policy and less any indebtedness under the policy.

Monthly income payments will be increased by \$2.46 per \$1000 of any paid up additions or dividend accumulations to the credit of the policy and will be decreased by \$2.46 per \$1000 of any indebtedness under the policy. In addition there will be paid yearly such share of interest earnings in excess of 3% per annum as the Company may from year to year determine.

If at the death of the Insured, the beneficiary is not living, or if the beneficiary shall not live to receive all the monthly income payments, the Company in either such event will pay the proceeds of the policy increased by the commuted value (at 3% per annum) of all monthly annuity certain payments then remaining unpaid, to the executors or administrators of the last survivor of the Insured and beneficiary or beneficiaries.

If at the death of the Insured the policy is payable to an assignee, the Company will pay the proceeds of the policy together with the commuted

Exhibit 1—(Continued)

value (at 3% per annum) of any monthly annuity certain payments required by the terms of this provision.

No beneficiary hereunder shall have the right to assign, change or commute any monthly income payments hereunder, nor shall any monthly income payments be subject to claims of creditors of such beneficiary.

The monthly annuity certain of \$7.54 per \$1000 of the face amount of the policy is granted in consideration of the statements and representations in the application herefor and of a special annual premium of \$43.20.

In consideration of the payment of a further special annual premium of \$1.10 the Company will waive the payment of the aforesaid premiums for the monthly annuity certain, if and when premiums under the policy are waived under any Total and Permanent Disability Provision.

The special premium for the annuity certain and the special premium for the Total and Permanent Disability Provision will be payable in addition to and under the same conditions as the regular premium under the policy during 15 years from the date of issue of this provision.

Upon request of the Insured on any policy anniversary and presentation of the policy and this supplementary provision to the Company this provision and all benefits hereunder will be cancelled.

This supplementary provision is subject to the conditions and provisions of said policy, so far as

Exhibit 1—(Continued)

applicable, and it shall supersede any method of settlement previously elected under said policy.

In Witness Whereof, the John Hancock Mutual Life Insurance Company has, by its President and Secretary, executed and delivered this supplementary provision and caused the same to be duly countersigned, at Boston, Massachusetts, on this Twenty Fourth day of February A.D. 1939.

/s/ Guy W. Cox,
President.

/s/ Charles J. Diman,
Secretary.

Countersigned:

/s/ F. G. Bowen,
Registrar.

[Endorsed]: Filed June 23, 1954.

[Title of Superior Court and Cause.]

SUMMONS

The People of the State of California Send Greeting to:

John Hancock Mutual Life Insurance Company,
Defendant.

You Are Hereby Directed to appear and answer the complaint in an action entitled as above brought against you in the Superior Court of the State of California, in and for the City and County of San Francisco, within ten days after the service on you of this summons—if served within this City and

County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court at the City and County of San Francisco, State of California.

Dated June 23, 1954.

[Seal] MARTIN MONGAN,

Clerk,

By H. J. GUDELJ,

Deputy Clerk.

[Endorsed]: Filed July 12, 1954.

[Title of District Court and Cause.]

UNDERTAKING ON REMOVAL

Know All Men by These Presents:

That American Surety Company of New York, a corporation organized and existing under the laws of the State of New York for the purpose of becoming surety on bonds required by law and which has complied with the laws of the State of California, is held and firmly bound unto Mary Troutfelt Cohen in the penal sum of Two Hundred Fifty Dollars (\$250.00) lawful money of the United States, for the payment hereof well and truly to be made unto the said Mary Troutfelt Cohen, the

said American Surety Company of New York binds itself, its successors, representatives and assigns firmly by these presents.

The condition of the above obligation is such that, whereas, the John Hancock Mutual Life Insurance Co., a Massachusetts Corporation, the Defendant, is about to file its petition in the United States District Court for the Northern District of California, Southern Division, for the removal of a certain cause pending in the Superior Court of the State of California in and for the City and County of San Francisco, State of California, wherein said Mary Troutfelt Cohen is plaintiff and the said John Hancock Mutual Life Insurance Co., is the defendant, to the United States District Court for the Northern District of California, Southern Division.

Now, therefore, if the said John Hancock Mutual Life Insurance Co., a corporation, shall well and truly pay all costs and disbursements incurred by reason of said removal proceedings, should it be determined that said suit was not removable or was improperly removed, then this obligation shall be void; otherwise it shall remain in full force and effect.

In witness whereof, said American Surety Company of New York has caused these presents to be signed and its corporate seal to be affixed this 9th day of July, 1954.

[Seal] AMERICAN SURETY COMPANY
OF NEW YORK,

/s/ By L. T. PLATT,
Res. Vice President,

Attest:

/s/ F. E. BUCKINGHAM,

Res. Asst. Secretary.

Bond #35-540-960

Premium \$10.00 term

Notary Public's Certification Attached.

[Endorsed]: Filed July 12, 1954.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Defendant above named answers plaintiff's complaint on file herein as follows:

I.

Answering paragraph 1 thereof defendant admits that at all times herein mentioned it is and has been a corporation organized and existing under the laws of the State of Massachusetts and authorized to transact and is transacting its business in the State of California and the State of New Mexico and has complied with the laws of each of said States therefor. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph.

II.

Answering paragraph 3 thereof defendant admits that on February 24, 1939 Martin E. Troutfelt and defendant entered into a contract of insurance on the life of said Martin E. Troutfelt, said contract

of insurance naming as beneficiary thereof Mary Troutfelt, wife. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant alleges that said policy was numbered 3171136, that pursuant to written application for conversion of said policy of insurance and modification thereof, dated respectively May 31, 1939 and July 11, 1939, defendant in accordance with the provisions of said policy therefor issued and delivered to said insured Martin E. Troutfelt its Policy of Insurance No. 3223099.

III.

Answering paragraph 4 thereof defendant admits that one of the supplements attached to said Policy of Insurance is a "Supplementary Provision For Family Income", a true and correct copy of which said supplementary provision as written and attached to said Policy of Insurance is attached to plaintiff's complaint as Exhibit 1. Defendant further admits that it issued and delivered to said Martin E. Troutfelt its Policy of Insurance No. 3223099. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant alleges that through mistake of one of defendant's scriveners the Supplementary Provision attached to and made a part of said Policy of Insurance was not in accordance with the written applications made by said Martin E. Troutfelt to defendant.

Attest:

/s/ F. E. BUCKINGHAM,

Res. Asst. Secretary.

Bond #35-540-960

Premium \$10.00 term

Notary Public's Certification Attached.

[Endorsed]: Filed July 12, 1954.

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Answering paragraph 1 thereof defendant admits that at all times herein mentioned it is and has been a corporation organized and existing under the laws of the State of Massachusetts and authorized to transact and is transacting its business in the State of California and the State of New Mexico and has complied with the laws of each of said States therefor. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph.

II.

Answering paragraph 3 thereof defendant admits that on February 24, 1939 Martin E. Troutfelt and defendant entered into a contract of insurance on the life of said Martin E. Troutfelt, said contract

of insurance naming as beneficiary thereof Mary Troutfelt, wife. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant alleges that said policy was numbered 3171136, that pursuant to written application for conversion of said policy of insurance and modification thereof, dated respectively May 31, 1939 and July 11, 1939, defendant in accordance with the provisions of said policy therefor issued and delivered to said insured Martin E. Troutfelt its Policy of Insurance No. 3223099.

III.

Answering paragraph 4 thereof defendant admits that one of the supplements attached to said Policy of Insurance is a "Supplementary Provision For Family Income", a true and correct copy of which said supplementary provision as written and attached to said Policy of Insurance is attached to plaintiff's complaint as Exhibit 1. Defendant further admits that it issued and delivered to said Martin E. Troutfelt its Policy of Insurance No. 3223099. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant alleges that through mistake of one of defendant's scriveners the Supplementary Provision attached to and made a part of said Policy of Insurance was not in accordance with the written applications made by said Martin E. Troutfelt to defendant.

IV.

Answering paragraph 5 thereof defendant admits that after the death of the insured it endorsed and executed the legend set forth in said paragraph and returned the said Policy of Insurance to Mary Troutfelt. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph.

V.

Answering paragraph 6 thereof defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant admits that under and pursuant to the written applications of said Martin E. Troutfelt for modification and conversion of said Policy of Insurance No. 3171136, it agreed to pay to Mary Troutfelt the benefits as requested in said applications and for the period therein specified as hereinafter more particularly referred to.

VI.

Answering paragraph 7 thereof defendant admits that said Martin E. Troutfelt paid the premiums for said Policy of Insurance as provided in his application therefor. Save and except as herein specifically admitted defendant denies generally and specifically each and every allegation contained in said paragraph.

VII.

Answering paragraph 8 thereof defendant admits that said insured duly performed all of the

conditions on his part agreed to be performed in and by said application for said Policy of Insurance.

VIII.

Answering paragraph 9 thereof defendant admits that after the death of the insured it paid to said Mary Troutfelt each month the sum of \$49.98 to and including February 1, 1954. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph.

IX.

Answering paragraph 10 thereof defendant admits that since February 1, 1954 it has failed and refused and continues to fail and refuse to pay any further monthly sum under said Policy of Insurance and applications therefor. Save and except as herein expressly admitted defendant denies generally and specifically each and every allegation contained in said paragraph. In this connection defendant alleges that it has tendered to and now stands ready, willing and able to pay to and does hereby offer to pay to plaintiff the sum of \$4,993.59, being the full face amount of said Policy of Insurance now due and payable under its terms and provisions and those of the applications therefor.

X.

Answering paragraph 11 thereof defendant denies generally and specifically the second sentence thereof.

XI.

Answering paragraph 12 thereof defendant admits the allegations therein contained save and except the last sentence thereof. In this connection defendant alleges that its position in said controversy is as hereinafter alleged.

As and for a First Affirmative Defense and Counterclaim Defendant Alleges as Follows:

I.

On February 24, 1939, pursuant to written application therefor by Martin E. Troutfelt, defendant issued and delivered its Policy of Insurance No. 3171136 on a 20-Payment Life Plan in the face amount of \$5,000.00, said Policy of Insurance having attached thereto and made a part thereof a Supplementary Provision For Family Income Rider providing for the payment of benefits as therein set forth in the event of the death of the insured within twenty years from February 24, 1939, for a period not to exceed twenty years from said date and further providing for the payment of premiums therefor for the first fifteen years of said term in the amount of \$52.95 annually.

II.

On or about May 31, 1939 said Martin E. Troutfelt made application to defendant for exchange or conversion of said Policy of Insurance No. 3171136 to a new endowment policy maturing in fifteen years upon his said life, said Policy of Insurance being numbered 3223099 and naming as beneficiary thereof Mary Troutfelt, wife. In con-

nection therewith and on or about July 11, 1939 said Martin Troutfelt made application to defendant for Supplementary Provision For Family Income to be attached to said new Policy of Insurance No. 3223099, said benefits to be paid in accordance with the terms and provisions of said application for not more than fifteen years from February 24, 1939 and for the payment of premiums therefor for a period of ten years in the annual amount of \$43.20. Each of said applications was attached to and made a part of and, together with the original application for the old Policy of Insurance No. 3171136 and the Supplementary provisions attached to said Policy of Insurance, constituted the full contract of insurance herein sued upon.

III.

Through mutual mistake of defendant and insured and by accident the Policy issued and delivered by defendant to said Martin E. Troutfelt was not the Policy contracted for by said insured and defendant in that through error of a scrivener in completing the Family Income Supplement to be attached to said new Policy of Insurance No. 3223099, the scrivener inserted as the duration for the payment of the said benefits the figure "20" rather than "15" and the term for the payment of premiums therefor, the figure "15" instead of "10".

IV.

At the time insured contracted with defendant for the converted Policy of Insurance and its supplementary agreements, at the time said Policy of

Insurance and said supplementary agreements were delivered by defendant to the insured and at all times since such delivery the insured, until his death, and the defendant, until on or about the 25th day of March, 1954, by mutual mistake and accident, believed that the Policy of Insurance and its supplementary agreements issued by defendant to the insured were the Policy of Insurance and supplementary agreements contracted for between defendant and the insured and that said issued Policy and supplementary agreements would give to the insured the insurance agreed upon by insured and defendant. In said Policy of Insurance the premium of \$43.20 for the 15-Year Plan was listed therein correctly. Said \$43.20 was the premium charged and paid during the lifetime of the insured.

V.

Upon the insured's death, June 28, 1945, defendant commenced payment under the Supplementary Provision For Family Income to continue for eight years, seven months, the balance of the endowment period. Monthly installments of \$49.98 each were paid to the beneficiary through January 24, 1954, and by the terms of the Policy and supplementary provision, a final payment of \$4,993.59 became payable to plaintiff on or about February 24, 1954.

VI.

On or about February 11, 1954 defendant tendered to plaintiff the final payment of \$4,993.59.

VII.

On or about March 29, 1954 in answer to de-

defendant's tender and request for surrender of the Policy of Insurance No. 3223099, plaintiff claimed to be entitled to a continuation of the monthly payments for an additional five years because of the erroneous provision of the Supplementary Provision For Family Income and refused to surrender the said Policy of Insurance.

VIII.

Defendant thereupon requested of plaintiff the written contract so that its written terms might be reviewed. On or about the 25th day of March, 1954 defendant received from plaintiff a photostatic copy of said Supplementary Provision For Family Income from plaintiff. Defendant thereupon discovered and became aware of the mistake alleged aforesaid. Immediately after said discovery defendant notified plaintiff of the mistake and demanded of plaintiff that said mistake be corrected and that plaintiff accept performance by defendant according to the contract of insurance as entered into between defendant and insured, but plaintiff refused and still refuses to correct said mistake or accept such performance.

IX.

On or about the 13th day of May, 1954 defendant again tendered to plaintiff the sum of \$4,993.59, but plaintiff refused and still refuses to accept the said tender.

X.

Defendant has no adequate remedy at law as against plaintiff and unless the relief asked by it

herein is granted, defendant will be irreparably damaged.

Wherefore, defendant prays that the "Supplementary Provision For Family Income" of Insurance Policy No. 3223099, a copy of which is attached to plaintiff's complaint therein as Exhibit 1, be reformed by striking the numerals "20" inserted in paragraph 1 thereof and the numerals "15" in the eighth paragraph thereof and by inserting therein the figures "15" and "10" respectively, and reforming it so that it will comply with the actual contract made between the insured and defendant as herein alleged.

That the Court declare that defendant is under no duty to make any further payments of Family Income to plaintiff and that its only obligation to plaintiff is to pay the sum of \$4,993.59, without interest, and only upon surrender of Policy of Insurance No. 3223099 and the relinquishment of any alleged legal rights of further payment thereunder.

That plaintiff take nothing by reason of her complaint.

That defendant recover its costs of suit incurred herein and for such other and further relief as may be equitable herein.

KEESLING & KEESLING,
/s/ By WILLIAM H. KEESLING,
Attorneys for Defendant.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 27, 1954.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Pursuant to Rule 36 of the Rules of Civil Procedure, plaintiff, Mary L. Troutfelt Cohen, requests defendant, John Hancock Mutual Life Insurance Company, within ten (10) days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That Exhibit A attached hereto is a true copy of defendant's policy No. 3223099, together with all written attachments thereto, as executed and delivered in 1939 by defendant to Martin E. Troutfelt and received by him.

2. That upon the death of Martin E. Troutfelt in 1945, plaintiff, his beneficiary:

(a) transmitted to defendant the original of said Exhibit A, and defendant received the same;

(b) made and delivered to defendant due proof of the insured's death and of plaintiff's claim as beneficiary;

(c) transmitted and surrendered the original of said Exhibit A to defendant as a part of such proof and claim.

3. That thereafter in 1945, defendant executed and endorsed upon the original of Exhibit A the legend set forth in paragraph 5 of the complaint herein and, so endorsed, returned it to plaintiff.

4. That plaintiff's execution and endorsement of said legend occurred as part of its processing said proof of death and claim.

5. That the execution and endorsement of said legend occurred as part of defendant's procedure for determining the amount and manner of payments to be made to the beneficiary.

6. That Martin E. Troutfelt was the insured and defendant the insurer in the contract of insurance entered into between them.

7. That said policy, including the supplementary provisions and all applications attached thereto, was written on forms prepared by defendant.

8. That the written Supplementary Provision for Family Income attached to said Exhibit A was wholly prepared by defendant and that Martin E. Troutfelt had no part in its preparation.

9. That after receipt by defendant from Martin E. Troutfelt of the two applications, one dated May 31, 1939, and the other dated July 11, 1939, copies of which are attached to said Exhibit A, no authorized representative of defendant orally informed Martin E. Troutfelt that defendant bound and committed itself to issue a policy of insurance.

10. That after receipt by defendant of said two applications, the only written communication or advice by defendant to said Martin E. Troutfelt that defendant insured or agreed to insure him consisted of the delivery to him of the original of said Exhibit A.

11. That after receipt by defendant of said two applications defendant never advised Martin E.

Troutfelt that premiums under the Family Income Provision would not have to be paid by him for more than ten years from February 24, 1939 (if he lived so long) in order to entitle his beneficiary to receive Family Income payments under the Supplementary Provision for Family Income, or that it was not necessary for him to pay such premiums for fifteen years from February 24, 1939 (if he lived so long).

12. That from time to time defendant knowingly issues, and in the past has issued, life insurance policies, including supplementary provisions, which varied in their terms from those stated in the prior application of the party to be insured, and that such policies have been accepted by said party and recognized by the defendant as the contract of insurance.

13. That defendant never informed Martin E. Troutfelt that any portion of the original of said Exhibit A was a mistake or the result of a mistake.

14. That not until May, 1954, did defendant ever inform plaintiff that any portion of the original Exhibit A was claimed to be a mistake or the result of a mistake.

15. That on the application for Supplementary Provision for Family Income dated July 11, 1939, attached to the original of Exhibit A, all typewriting was inserted on the form by a representative of defendant and none by Martin E. Troutfelt.

16. That on said application the said typewritten insertions were placed on the form after the form was signed by said Martin E. Troutfelt.

17. That defendant never informed Martin E. Troutfelt that the amount of premium to be paid for the Supplementary Provision for Family Income attached to a fifteen year endowment policy, where the premium was payable for fifteen years (or until insured's death, if earlier) and the family income was payable until the termination of twenty years from the policy's issuance date, was different than if the income was payable for a period expiring fifteen years from the policy's issuance date and the premium was payable for ten years (or until insured's death, if earlier).

18. That defendant never informed Martin E. Troutfelt that it did not or would not issue a Supplementary Provision for Family Income which would exceed the term of the policy to which it was attached.

Dated: August 11, 1954.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 11, 1954.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSION

John Hancock Mutual Life Insurance Company, defendant, makes the following statement in response to the request for admission of facts and of genuineness of documents served upon it by plaintiff on August 11, 1954:

1. Defendant admits that Exhibit A, attached to plaintiff's Request for Admissions on file herein, is a true copy of defendant's policy No. 3223099, together with all written attachments thereto, as executed and delivered in 1939 by defendant to Martin E. Troutfelt and received by him.

2. Defendant admits that upon the death of Martin E. Troutfelt in 1945, plaintiff, his beneficiary:

(a) transmitted to defendant the original of said Exhibit A, and defendant received the same;

(b) made and delivered to defendant due proof of the insured's death and of plaintiff's claim as beneficiary;

(c) transmitted and surrendered the original of said Exhibit A to defendant as a part of such proof and claim.

3. Defendant admits that thereafter in 1945, it executed and endorsed upon the original of Exhibit A the legend set forth in paragraph 5 of the complaint herein and, so endorsed, returned it to plaintiff.

4. Defendant admits that its execution and en-

dorsement of said legend occurred as part of its processing said proof of death and claim.

5. Defendant denies that the execution and endorsement of said legend occurred as part of its procedure for determining the amount and manner of payments to be made to the beneficiary. In this connection the determination of the amount and manner of payments to be made to the beneficiary is made from defendant's own Home Office records.

6. Defendant admits that Martin E. Troutfelt was the insured and defendant the insurer in the contract of insurance entered into between them.

7. Defendant admits that said policy, including the supplementary provisions and all applications attached thereto, was written on forms prepared by defendant.

8. Defendant admits that the written Supplementary Provision for Family Income attached to said Exhibit A was wholly prepared by defendant from the application therefor made by Martin E. Troutfelt dated July 11, 1939 at Albuquerque, New Mexico.

9. Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny plaintiff's Request No. 9 inasmuch as the writing agent on the policy, George E. Troutfelt, left the service of the Company on February 13, 1946.

10. Defendant is without knowledge or information as to the facts upon which it can truthfully

admit or deny plaintiff's Request No. 10 for the reasons set forth in answer to Request No. 9, except that in addition to the delivery to Martin E. Troutfelt of the original Exhibit A defendant issued its official receipt for the premium for the term, plan, and amount for which said Martin E. Troutfelt made application.

11. Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny plaintiff's Request No. 11 for the reasons set forth in answer to Request No. 9.

12. Defendant denies that from time to time it knowingly issues, and in the past has issued, life insurance policies, including supplementary provisions, which varied in their terms from those stated in the prior application of the party to be insured, and that such policies have been accepted by said party and recognized by defendant as the contract of insurance. In this connection, no policy with or without supplementary provisions, the terms of which varied from those stated in the original application, would be issued by the defendant unless such application had been modified by an amendment to the application signed by the party to be insured.

13. Defendant admits that it never informed Martin E. Troutfelt that any portion of the original of said Exhibit A was a mistake or the result of a mistake.

14. Defendant admits that not until May, 1954, did defendant ever inform plaintiff that any por-

tion of the original Exhibit A was claimed to be a mistake or the result of a mistake.

15. Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny plaintiff's Request No. 15 for the reasons set forth in answer to Request No. 9.

16. Defendant denies that on said application the said typewritten insertions were placed on the form after the form was signed by said Martin E. Troutfelt.

17. Defendant admits plaintiff's Request No. 17 because no such difference could be described as the defendant never offers or agrees to issue a supplementary provision for Family Income for a period of income payments extending beyond the maturity date of an endowment policy with which it had been issued.

18. Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny plaintiff's Request No. 18 for the reasons set forth in answer to Request No. 9.

State of Massachusetts
County of Suffolk—ss.

Charles N. Ladd, being duly sworn, says: That he is the Assistant Secretary of the John Hancock Mutual Life Insurance Company, a corporation, the above named defendant, and is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing Response to Request for Admission and knows the

contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

/s/ CHARLES N. LADD,
Assistant Secretary.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 30, 1954.

[Title of District Court and Cause.]

INTERROGATORIES TO DEFENDANT

Pursuant to Rule 33 of the Rules of Civil Procedure, plaintiff, Mary L. Troutfelt Cohen, requests that defendant John Hancock Mutual Life Insurance Company, a corporation, answer the following interrogatories under oath within 15 days after service thereof:

1. Upon what facts, events and circumstances does defendant rely as showing or tending to show that through mutual mistake of defendant and insured, and by accident, policy #3223099 (including the Supplementary Provision for Family Income attached thereto), issued and delivered by defendant to Martin E. Troutfelt, was not the contract of the parties.

2. If among the facts, events and circumstances stated in reply to Interrogatory 1 are writings of any kind;

(a) identify any such writing;

(b) attach a copy to your answer, or set out its contents.

3. Does defendant intend to rely on the testimony of any person as showing or tending to show any of the said facts, events and circumstances?

4. If the answer to Interrogatory 3 is "yes";

(a) give the name, address and occupation of any such person;

(b) summarize the expected testimony of each such person.

5. Upon what facts, events and circumstances does defendant rely as showing or tending to show that Martin E. Troutfelt knew, believed, or should have known that policy #3223099 (including the Supplementary Provision for Family Income attached thereto), issued and delivered by defendant to Martin E. Troutfelt, was not the policy defendant intended to issue, or believed that it was issuing, to said insured.

6. If among the facts, events and circumstances stated in reply to Interrogatory 5 are writings of any kind;

(a) identify any such writing;

(b) attach a copy to your answer, or set out its contents.

7. Does defendant intend to rely on the testimony of any person as showing or tending to show any of the said facts, events and circumstances?

8. If the answer to Interrogatory 7 is "yes";

(a) give the name, address and occupation of any such person;

(b) summarize the expected testimony of each such person.

9. Did defendant keep in its files a copy of the policy of which Exhibit A to plaintiff's Request for Admissions is a copy, after delivering the original thereof to Martin E. Troutfelt in 1939?

Dated October 8, 1954.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON.

Affidavit of Mailing Attached.

[Endorsed]: Filed October 11, 1954.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Plaintiff replies to the Counterclaim of defendant as follows:

1. Replying to paragraph I of the Counterclaim, plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averment that the amount of the premium provided for in the Supplementary Provision for Family Income attached to Policy #3171136 was \$52.95 annually.

2. Replying to paragraph II of the Counterclaim, plaintiff admits that on or about May 31,

1939, Martin E. Troutfelt executed an application to defendant, and alleges that a true copy thereof appears as part of Exhibit A attached to plaintiff's Request for Admissions filed August 11, 1954; admits that on or about July 11, 1939 said Martin E. Troutfelt executed an application to defendant, and alleges that a true copy appears as part of Exhibit A attached to plaintiff's Requests for Admissions filed August 11, 1954; alleges that thereafter and on or about July 27, 1939 defendant executed and issued (as of February 24, 1939) its Policy #3223099, including a Supplementary Provision for Family Income in the exact form of Exhibit 1 attached to the Complaint, and that Exhibit A attached to plaintiff's Requests for Admissions filed August 11, 1954 is a true copy of said policy as executed by defendant in 1939; alleges that thereupon defendant tendered and delivered said policy with said Supplementary Provision for Family Income as its contract of insurance to Martin E. Troutfelt, that said Troutfelt then received and accepted the same, surrendered Policy #3171136 to defendant, paid to defendant the sum of \$37.70 for the cost of conversion, the first installment of the premium provided for in said policy, and the first installment of the premium provided for in said Supplementary Provision for Family Income; admits that each of said applications, together with the original application for the old policy of insurance #3171136, was attached to Policy #3223099; and denies all the other allegations of said paragraph II.

3. Plaintiff denies all the allegations of paragraph III of the Counterclaim.

4. Replying to paragraph IV of the Counterclaim, admits that at the time the insured contracted with the defendant for the converted policy of insurance, including supplementary agreements, to wit, at the time said policy of insurance including said supplementary agreements were delivered by defendant to the insured and accepted by the latter, and at all times since such delivery and acceptance the insured, until his death, and the defendant believed that the written policy of insurance, including said supplementary agreements, and delivered by defendant to the insured, were, and plaintiff alleges that they were in fact, the policy of insurance contracted for between defendant and the insured and that they did give to the insured the insurance agreed upon by insured and defendant; admits that the premium of \$43.20 was the premium charged and paid annually by the insured during his lifetime for the said Supplementary Provision for Family Income; denies that there was ever any mutual mistake or accident or mistake at all, and denies that the premium of \$43.20 provided to be paid annually was for any so-called 15 year plan; denies each and every other allegation of said paragraph IV.

5. Replying to paragraph V of the Counterclaim, plaintiff admits that upon the insured's death, June 28, 1945, defendant commenced payment under the Supplementary Provision for Family Income; ad-

mits that monthly installments of \$49.98 each were paid to the beneficiary through January 24, 1954; and denies all the other allegations of said paragraph V.

6. Replying to paragraph VI of the Counterclaim, plaintiff admits and alleges that on or about February 11, 1954 defendant tendered to plaintiff the sum of \$4,993.59 on condition that plaintiff surrender Policy #3223099 and all her rights thereunder; denies all other allegations of paragraph VI.

7. Replying to paragraph VII of the Counterclaim, plaintiff admits that on or about March 29, 1954, and in answer to defendant's said tender and request for surrender of the Policy of Insurance #3223099, plaintiff claimed to be entitled to a continuation of the monthly payments for an additional five years and refused to surrender the said policy of insurance; denies all the other allegations of said paragraph VII.

8. Replying to paragraph VIII of the Counterclaim, plaintiff admits that defendant thereupon requested of plaintiff the written contract, and that on or about March 25, 1954, defendant received from plaintiff a photostatic copy of said Supplementary Provision for Family Income; and denies all the other allegations of said paragraph.

9. Replying to paragraph IX of the Counterclaim, plaintiff admits and alleges that on or about May 13, 1954, defendant again tendered to plaintiff the sum of \$4,993.59 on condition that plaintiff sur-

render Policy #3223099 and all her rights thereunder and that plaintiff refused and still refuses to accept the said tender; denies all other allegations of paragraph IX.

10. Plaintiff denies all the allegations of paragraph X of the Counterclaim.

Second Defense

Exhibit A attached to Plaintiff's Request for Admissions filed August 11, 1954 is a true copy of Policy of Insurance #3223099 issued to Martin Troutfelt in 1939 and referred to in the complaint herein. Said policy contained and contains the following incontestability clause:

"This policy, except any supplementary provision hereof granting any benefit for total and permanent disability, or granting any additional insurance specifically against death caused by certain bodily injuries sustained through accidental means, shall be incontestable after it has been in force during the lifetime of the Insured for two years from its date of issue, except for non-payment of premium, and except that if the Insured's age has been misstated, the amount payable hereunder shall be that which the premium paid would have purchased at the correct age."

Said policy was in force during the lifetime of the insured from its issuance in 1939 to his death in 1945. By virtue thereof defendant is barred from seeking reformation of the Supplementary Provision for Family Income.

Third Defense

1. If any mistake occurred, as alleged in defendant's answer and counterclaim, which plaintiff denies, it occurred in 1939.

2. Upon the death of Martin E. Troutfelt in 1945, plaintiff, his beneficiary, made and delivered to defendant due proof of said insured's death and of plaintiff's claim as beneficiary, and as part of such proof and claim transmitted and surrendered to defendant, and defendant received, the original of said policy No. 3223099, a true copy of which is attached to Plaintiff's Request for Admissions filed August 11, 1954 as Exhibit A.

3. Defendant thereupon had the opportunity to read, did read, and should have read said policy and, as part of defendant's processing of said proof of death and claim, defendant in 1945 endorsed and executed on said policy No. 3223099 the legend set forth and quoted in paragraph 5 of the Complaint herein, viz.:

“Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income, dated February 24, 1939, attached hereto.

John Hancock Mutual Life Insurance Company
By [Sig.] Elmer L. French, Secretary
Dated at Boston, Mass., July 26, 1945.”

and thereafter in 1945 defendant returned said policy, so endorsed, to plaintiff.

4. The defendant then and there discovered in law any alleged mistake, if one existed.

5. The alleged affirmative defense of mistake and the alleged right of action set forth in the Counterclaim accrued, and the discovery by defendant of the alleged mistake on which the Counterclaim is based occurred, more than three years before the commencement of this action or the filing of the Counterclaim, and the Counterclaim and the alleged affirmative defense of mistake are and each is barred by the statute of limitations.

Fourth Defense

The alleged affirmative defense of mistake and the cause of action set forth in the Counterclaim is barred by the provisions of Section 338, subdivision 3, of the California Code of Civil Procedure.

Fifth Defense

The alleged affirmative defense of mistake and the alleged right of action set forth in the Counterclaim did not accrue within four years next before the commencement of this action or the filing of the Counterclaim and is barred by the statute of limitations.

Sixth Defense

The alleged affirmative defense of mistake and the alleged cause of action set forth in the Counterclaim is barred by the provisions of Section 337, subdivision 1, of the California Code of Civil Procedure.

Seventh Defense

The alleged affirmative defense of mistake and the alleged cause of action set forth in the Counter-

claim is barred by the provisions of Section 343 of the California Code of Civil Procedure.

Eighth Defense

The alleged affirmative defense of mistake and the cause of action set forth in the Counterclaim is barred by the provisions of Section 339, subdivision 1, of the California Code of Civil Procedure.

Ninth Defense

1. After the said written policy of insurance, including said Supplementary Provision for Family Income, was prepared by defendant's scrivener, and before issuance and delivery to Martin E. Troutfelt, it was submitted to, examined by, and executed by defendant's Registrar acting on his own behalf and on behalf of its president and secretary, said policy and said Supplementary Provision were countersigned by said Registrar, and said policy, including said Supplementary Provision, was endorsed and executed by defendant's secretary thus:

“This Policy is issued, effective on the date of this endorsement as of its date of issue, in conversion of Policy No. 3171136, dated February 24, 1939, which is terminated as of the date of this endorsement, and in consideration of the surrender of the said policy and the payment of Thirty Seven and 70/100 Dollars, for the cost of the said conversion.

John Hancock Mutual Life Insurance Company,

By Charles J. Diman,
Secretary.

Dated at Boston, Mass., July 27, 1939.”

2. Thereafter defendant permitted the insured to pay premiums throughout the remainder of his lifetime in reliance on the policy as written.

3. Plaintiff incorporates herein the allegations of paragraphs 2 and 3 of its Third Defense to the Counterclaim.

4. Thereby defendant represented, and promised plaintiff in writing, that it would pay plaintiff in accordance with the Supplementary Provision for Family Income as written and attached to the policy.

5. Thereby, also, defendant ratified the policy and Supplementary Provision for Family Income, as written.

6. Defendant never informed Martin E. Troutfelt that any portion of said policy No. 3223099 was a mistake or the result of a mistake and defendant did not inform plaintiff that any portion of said policy was claimed to be a mistake or the result of a mistake until May of 1954.

7. Had the defendant advised plaintiff in 1945, upon its return of the policy to her of its claim of mistake, plaintiff could have examined the papers and effects of her deceased husband, the insured,

for evidence that might cast light on insured's understanding of the policy, but papers and effects of insured, long ago thought to be valueless, were thereafter destroyed after his death.

8. By reason of the facts stated above, defendant was guilty of negligence and gross negligence in preparing, issuing, examining and handling said insurance policy, and in each and every one of its dealings with said policy, is estopped from asserting any alleged mistake with respect to the Supplementary Provision for Family Income, and is guilty of laches in now seeking reformation over fourteen years after the issuance of said policy and Supplementary Provision, and over eight years after the death of the insured and the execution of the legend referred to in paragraph 3 above.

Tenth Defense

The Counterclaim fails to state a claim on which relief can be granted.

Wherefore, plaintiff prays that defendant take nothing by its counterclaim, and that judgment be entered for plaintiff in accordance with the prayer of the complaint.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Dec. 6, 1954.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES
PROPOUNDED BY PLAINTIFF

Now comes defendant John Hancock Mutual Life Insurance Company, a corporation, and in response to the interrogatories propounded by plaintiff answers as follows:

No. 1. Defendant relies upon the insured's specifications for coverage set forth in his applications and his signed verifications therein that the statements and answers contained therein were complete, true and correctly recorded and formed the bases of the contract of insurance and of the Supplementary provision for family income; the amount of premium paid for coverage; the type of Family Income Rider customarily issued by the company under the type of policy issued to insured; the company's practice of issuing a policy or supplementary provision in strict conformance with the application therefor, or otherwise requiring that a policy amendment first be signed by the applicant; and the fact that the company never considered policy No. 3223099 with the Supplementary Provision for Family Income attached thereto to be representative of the contract of insurance entered into between the company and the insured.

No. 2.

(a) Application for insurance for Policy No. 3171136, dated February 1, 1939; application for exchange or conversion of policy made by the in-

sured dated May 31, 1939; application for Supplementary Provision for Family Income dated July 11, 1939; ordinary policy modification record dated July 27, 1939.

(b) Copies thereof are attached hereto.

No. 3. Yes.

No. 4.

(a) Alfred Keefe, Regional Supervisor, John Hancock Mutual Life Insurance Co., 805 N. Brand Boulevard, Glendale 3, Calif.

Franklin G. Bowen, Section Head, John Hancock Mutual Life Insurance Co., 110 North Central Avenue, Wollaston, Mass.

(b) The expected testimony of Mr. Keefe is that at the time the original policy was written the insured, a brother of the company's agent, George Troutfelt, came to San Francisco from Albuquerque, New Mexico, where he resided, and executed the application for policy No. 3171136 in San Francisco in the presence of Agent George Troutfelt and himself. Mr. Keefe explained the contract fully to the insured, who had full knowledge of the type of policy he was applying for at the time that the original application was written. The matter of conversion from policy No. 3171136 to policy No. 3223099 was handled by mail. The forms were executed and witnessed in Albuquerque. Mr. Keefe will testify that under no circumstances would he have informed the insured that the insured could have obtained a twenty-year Family Income rider on a fifteen-year Endowment policy; that the company

would not under any circumstances accept application for a Family Income rider covering a period which would extend beyond the term of the policy itself which, in this case, was fifteen years.

The expected testimony of Mr. Bowen is concerning the company's procedure in writing policies at the time of issuance of converted policy No. 3223099 when he was company Registrar, the type of Family Income Rider then customarily issued by the company under the type of policy issued by the insured, and the company's practice at that time of issuing a policy or supplementary provision in strict conformance with the application therefor, or otherwise requiring that a policy amendment first be signed by the applicant.

No. 5. Defendant relies upon insured's applications for policy and Supplementary Provision for Family Income, the amount of premium paid for coverage, wherein he applied for the Family Income Rider for a fifteen-year duration with a ten-year term for the payment of premiums, rather than his previous insurance with a twenty-year duration and a fifteen-year term for the payment of premiums; the change of premium from \$52.95 to \$43.20.

No. 6. Such writings are identified and attached hereto as set forth in answer to No. 2 above.

No. 7. Yes.

No. 8. See answer to No. 4 above.

No. 9. No.

Dated: November 30, 1954.

/s/ CHARLES N. LADD.

Subscribed and sworn to before me by Charles N. Ladd, Assistant Secretary of John Hancock Mutual Life Insurance Company, at Boston, Massachusetts, on this the 30th day of November, A.D., 1954.

[Seal] /s/ THOMAS H. SMITH,

Notary Public in and for the Commonwealth of Massachusetts. My commission expires June 18, 1959.

Affidavit of Service Attached.

[Endorsed]: Filed Dec. 7, 1954.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES
PROPOUNDED BY PLAINTIFF

Now comes defendant John Hancock Mutual Life Insurance Company, a corporation, and in response to the interrogatories propounded by plaintiff answers as follows:

No. 1. Defendant relies upon the insured's specifications for coverage set forth in his applications and his signed verifications therein that the statements and answers contained therein were complete, true and correctly recorded and formed the bases of the contract of insurance and of the Supplementary provision for family income; the amount of premium paid for coverage; the type of Family Income Rider customarily issued by the company under the type of policy issued to insured; the company's practice of issuing a policy or supplementary provision in strict conformance with the application therefor, or otherwise requiring that a policy amendment first be signed by the applicant; and the fact that the company never considered policy No. 3223099 with the Supplementary Provision for Family Income attached thereto to be representative of the contract of insurance entered into between the company and the insured.

No. 2.

(a) Application for insurance for Policy No. 3171136, dated February 1, 1939; application for exchange or conversion of policy made by the in-

sured dated May 31, 1939; application for Supplementary Provision for Family Income dated July 11, 1939; ordinary policy modification record dated July 27, 1939.

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(a) Alfred Keefe, Regional Supervisor, John Hancock Mutual Life Insurance Co., 805 N. Brand Boulevard, Glendale 3, Calif.

Franklin G. Bowen, Section Head, John Hancock Mutual Life Insurance Co., 110 North Central Avenue, Wollaston, Mass.

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would not under any circumstances accept application for a Family Income rider covering a period which would extend beyond the term of the policy itself which, in this case, was fifteen years.

The expected testimony of Mr. Bowen is concerning the company's procedure in writing policies at the time of issuance of converted policy No. 3223099 when he was company Registrar, the type of Family Income Rider then customarily issued by the company under the type of policy issued by the insured, and the company's practice at that time of issuing a policy or supplementary provision in strict conformance with the application therefor, or otherwise requiring that a policy amendment first be signed by the applicant.

No. 5. Defendant relies upon insured's applications for policy and Supplementary Provision for Family Income, the amount of premium paid for coverage, wherein he applied for the Family Income Rider for a fifteen-year duration with a ten-year term for the payment of premiums, rather than his previous insurance with a twenty-year duration and a fifteen-year term for the payment of premiums; the change of premium from \$52.95 to \$43.20.

No. 6. Such writings are identified and attached hereto as set forth in answer to No. 2 above.

No. 7. Yes.

No. 8. See answer to No. 4 above.

No. 9. No.

Dated: November 30, 1954.

/s/ CHARLES N. LADD.

Subscribed and sworn to before me by Charles N. Ladd, Assistant Secretary of John Hancock Mutual Life Insurance Company, at Boston, Massachusetts, on this the 30th day of November, A.D., 1954.

[Seal] /s/ THOMAS H. SMITH,

Notary Public in and for the Commonwealth of Massachusetts. My commission expires June 18, 1959.

Affidavit of Service Attached.

[Endorsed]: Filed Dec. 7, 1954.

[Title of District Court and Cause.]

STATEMENT OF ADMITTED FACTS

For the Court's convenience, we set forth here certain facts admitted either by the pleadings or by defendant's response to plaintiff's Requests for Admissions.

1. Defendant is and at all times mentioned in the complaint was a Massachusetts corporation authorized to do and doing business in California. (Complaint, para. 1; Answer, para. I.)

2. Defendant issued and delivered to Martin E. Troutfelt its policy of insurance No. 3223099. (Answer, para. III.)

3. This policy was delivered to the insured in 1939 and received by him. (R.A. 1.)

Exhibit A attached to plaintiff's Request for Admissions is a true copy of policy No. 3223099, together with all written attachments thereto, as executed and delivered in 1939 by defendant to Martin E. Troutfelt and received by him. (R.A. 1.)

5. One of the supplements attached to and made a part of said policy is a "Supplementary Provision for Family Income". A true copy of said supplement as written and attached to said policy is attached to plaintiff's complaint as Exhibit 1. (Complaint, para. 4; Answer, para. III.) Said supplement provides in material part:

"If * * * the death of the Insured shall occur

within 20 years from the date hereof [February 24, 1939], the Company * * * will, in lieu of immediate payment of the amount insured in one sum, pay to the beneficiary * * * on the first day of each policy month following the death of the Insured, a monthly income * * * the last monthly income payment to be made on the first day of the policy month directly preceding the expiration of 20 years from the date of issue of this provision. Upon the expiration of the said period the Company will pay the amount insured. * * *

* * * * *

“The special premium [for this monthly income] will be payable in addition to and under the same conditions as the regular premium under the policy during 15 years from the date of issue of this provision.”

It is the obligation imposed by the underscored language which defendant refuses to perform.

6. The insured duly performed all of the conditions on his part agreed to be performed in and by said contract. (Complaint, para. 8; admitted by failure to deny.)

7. Martin E. Troutfelt died June 28, 1945. At all times mentioned in the complaint prior thereto, he and plaintiff were husband and wife. (Complaint, paragraph 2; admitted by failure to deny.)

8. Upon the death of Martin E. Troutfelt in 1945, plaintiff, his beneficiary:

(a) transmitted to defendant the original of said policy No. 3223099, and defendant received the same;

(b) made and delivered to defendant due proof of the insured's death and of plaintiff's claim as beneficiary;

(c) transmitted and surrendered the original of said policy No. 3223099 to defendant as a part of such proof and claim. (R.A. 2.)

9. There after in 1945 defendant executed and endorsed upon the original policy No. 3223099 the legend set forth in paragraph 5 of the complaint and, as so endorsed, returned it to plaintiff. (R.A. 3.)

10. The legend above referred to reads as follows:

“Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income, dated February 24, 1939, attached hereto.

“John Hancock Mutual Life Insurance Company,

By (Sig.) Elmer L. French, Secretary

Dated at Boston, Mass., July 26, 1945.”

(Complaint, para. 5; Answer, para. IV.)

11. Defendant's execution and endorsement of said legend occurred as part of its processing said proof of death and claim. (R.A. 4.)

12. Martin E. Troutfelt was the insured and de-

fendant the insurer in the contract of insurance entered into between them. (R.A. 6.)

13. Said policy, including the supplementary provisions and all applications attached thereto, was written on forms prepared by defendant. (R.A. 7.)

14. The written Supplementary Provision for Family Income attached to said policy No. 3223099 was wholly prepared by defendant and Martin E. Troutfelt had no part in its preparation. (R.A. 8.)

15. After receipt by defendant from Martin E. Troutfelt of the two applications, one dated May 31, 1939 and the other dated July 11, 1939, copies of which are attached to policy No. 3223099, no authorized representative of defendant orally informed Martin E. Troutfelt that defendant bound and committed itself to issue a policy of insurance. (R.A. 9.) [That is to say, Troutfelt's first notification of defendant's willingness to insure him was receipt of the policy itself.]

16. After receipt by defendant of said two applications, the only written communication or advice by defendant to Martin E. Troutfelt that defendant insured or agreed to insure him consisted of the delivery to him of the original of policy No. 3223099. (R.A. 10.)

17. After receipt by defendant of said two applications defendant never advised Martin E. Troutfelt that premiums under the Family Income Provision would not have to be paid by him for more than ten years from February 24, 1939 (if he lived so long)

in order to entitle his beneficiary to receive Family Income payments under the Supplementary Provision for Family Income, or that it was not necessary for him to pay such premiums for fifteen years from February 24, 1939 (if he lived so long). (R.A. 11.) [That is to say, defendant never notified Troutfelt that he would not have to pay the premiums called for in the supplementary provision.]

18. Defendant never informed Martin E. Troutfelt that any portion of the original of policy No. 3223099 was a mistake or the result of a mistake. (R.A. 13.)

19. Not until May, 1954 did defendant ever inform plaintiff that any portion of the original of policy No. 3223099 was claimed to be a mistake or the result of a mistake. (R.A. 14.)

20. On the application for Supplementary Provision for Family Income dated July 11, 1939, attached to the original of policy No. 3223099, all typewriting was inserted on the form by a representative of defendant and none by Martin E. Troutfelt. (R.A. 15.)

21. Defendant never informed Martin E. Troutfelt that the amount of premium to be paid for the Supplementary Provision for Family Income attached to a fifteen-year endowment policy, where the premium was payable for fifteen years (or until insured's death, if earlier) and the family income was payable until the termination of twenty years from the policy's issuance date, was different than

if the income was payable for a period expiring fifteen years from the policy's issuance date and the premium was payable for ten years (or until insured's death, if earlier). (R.A. 17.)

22. Defendant never informed Martin E. Troutfelt that it did not or would not issue a Supplementary Provision for Family Income which would exceed the term of the policy to which it was attached. (R.A. 18.)

23. After the death of the insured, defendant paid to plaintiff each month the sum of \$49.98 to and including February 1, 1954. (Complaint, para. 9; Answer, para. VIII.)

24. Since February 1, 1954, defendant has failed and refused and continues to fail and refuse to pay any further monthly sum. (Complaint, para. 10; Answer, para. IX.)

25. On or about May 13, 1954, defendant notified plaintiff in writing that it "does not consider it is liable for any further monthly payments under the family income provision, but is only liable for final payment of \$4,993.59, which was due and payable on February 24, 1954." (Complaint, para. 11; admitted by failure to deny.)

26. An actual controversy exists between plaintiff and defendant. Plaintiff asserts that under said contract defendant is under the legal duty to pay to her, and plaintiff has the legal right to receive from defendant, the family income payments of \$50 per month for each and every month to and including

February 1, 1959, in addition to the sum of \$5,000, and further asserts that in view of said anticipatory breach by defendant, plaintiff has the legal right to receive and defendant is under the legal duty to pay to plaintiff, forthwith, the said entire sum of \$8,000. The defendant asserts that it is under no duty to make any further payments of family income to the plaintiff and further asserts that its only obligation to plaintiff is to pay the sum of \$4,993.59 and then only in the event plaintiff should surrender the policy and relinquish all rights to further payment thereunder. (Complaint, para. 12; admitted by failure to deny.)

Respectfully submitted,

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 9, 1955.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Plaintiff brought suit in the California state court to recover sums alleged to be due her as beneficiary of a life insurance policy between defendant company and plaintiff's deceased husband. Defendant removed the suit to this Court on the basis of diversity of citizenship.

Under the policy originally issued to the insured,

the insured was to pay premiums for twenty years (or until maturity of the policy) and the face amount of the policy was payable to the beneficiary upon the death of the insured. There was attached a supplementary provision for family income. This provision required the insured to pay an additional premium for fifteen years, and provided for monthly payments to the beneficiary for a period not to exceed twenty years from the date of the policy, only in the event of the death of the insured within twenty years from the date of the policy.

Within a few months after the original policy was issued, the insured applied for conversion of the main policy to a fifteen year endowment policy. The application also requested a family income rider under which the insured would pay an additional premium for ten years, and his beneficiary would get monthly payments for a period not to exceed fifteen years from the date of the policy if the insured died within fifteen years from the date of the policy.

In issuing the new policy to the insured, defendant insurer made a mistake in the family income rider. The rider actually issued provided for the payment of an additional premium for fifteen years (instead of ten), and for monthly benefits for a period not to exceed twenty years (instead of fifteen years) from the date of the policy if the insured died within twenty years from the date of the policy. Defendant charged the insured a premium that would have been correct for the rider applied

for, but was ten dollars per year less than the correct premium for the rider as issued.

The insured died about six years after the policy was issued. Plaintiff claims to be entitled to monthly benefits under the family income rider as actually issued, for a period up to twenty years from the date of the policy. Under the defense of mistake, defendant claims it is liable for monthly payments for a period not in excess of fifteen years from the date of the policy, because the insured applied for such a rider and paid the premium for it; and, on the ground of mistake, defendant counterclaims for reformation of the policy so that it will conform to the policy applied for by the insured.

Defendant's counterclaim for equitable relief is barred by the applicable statute of limitations. Under California Code of Civil Procedure §338(4), an action for relief on the ground of fraud or mistake must be begun within three years after discovery of the facts constituting the fraud or mistake. But under this section, "It is well settled, of course, that the means of knowledge are the equivalent of knowledge." *Consolidated R. & P. Co. v. Scarborough*, 216 Cal. 698, 703-704. The mistake relied upon by the defendant occurred about the time the policy was issued in 1939. In 1945 the policy was returned to the defendant after the death of the insured. At that time the following statement was typed upon the policy and signed by an officer of the defendant:

“Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income, dated February 24, 1939, attached hereto.”

The conclusion is inescapable that defendant had the means of discovering its mistake at the time it received the original policy from the beneficiary and processed her claim. Yet defendant alleges that it did not discover its error until 1954, nine years after it endorsed on the policy the statement quoted above. Nothing is offered by way of excuse for defendant's failure to discover its mistake within three years after it occurred. In *Bradbury v. Higginson*, 167 Cal. 553, 558 the California Supreme Court said:

“But a mere averment of ignorance of a fact which a party might with reasonable diligence have discovered is not enough to postpone the running of the statute. [citations omitted] It is necessary for the party seeking to avoid the bar to affirmatively plead facts excusing the failure to make an earlier discovery of the mistake or fraud relied upon.” [citations omitted].

There is no proof of facts tending to excuse defendant's failure to discover its mistake within three years after it occurred, or at least within six years after it occurred (when it processed the beneficiary's claim).

There is nothing in the proof to excuse defendant's lack of diligence, and therefore it is the conclusion of this Court that by the exercise of ordinary care, the defendant could have discovered its

mistake in 1945, nine years before it set up its claim for equitable relief by way of counterclaim.

Even if the statute of limitations had not barred defendant's counterclaim plaintiff would prevail because defendant has failed to prove mutual mistake; defendant has not shown that the insured knew or should have known of defendant's mistake.

Defendant argues that the policy issued was different from the policy applied for by the insured, and therefore the insured must have noticed the difference. It is entirely possible, however, that the insured noticed the difference and acquiesced in it, assuming that the company intentionally made the change, either because it could not write the policy as applied for or because it preferred not to write it in accordance with the application. In *Metropolitan Life Insurance Co. v. Banion*, 10th Cir., 106 F. 2d 561, 567 the court said:

"But an insurance company may make a binding contract of insurance by issuing and delivering the policy and accepting the premium upon it, even though the insured applied for a different kind of policy. The issuance, delivery, and acceptance of the policy, and the payment, acceptance, and retention of the premium can constitute an enforceable contract of insurance despite the fact that it departs in some respects from the policy outlined in the application."

The policy as issued obligated the insurer to pay monthly benefits to the beneficiary for a period five years longer than the policy applied for, but it also

required the insured to pay premiums for a period five years longer than the policy applied for. Therefore it would be reasonable for the insured to believe that the changes were intentional, if he noticed them, since the obligation of the insured to pay premiums appeared to be increased to the same extent that the policy increased the obligation of the insurer to make monthly payments.

Defendant also argues that the insured must have known that defendant had made a mistake from the fact that the insured was charged a premium that was correct for the policy applied for, but was ten dollars per year less than the correct premium for the policy as issued. This line of argument is not convincing. The premium under the original policy and the premium paid by the insured under the policy after conversion both were computed on the basis of five different types of insurance coverage. Each of those five types of coverage were changed to some extent when the policy was converted. The premium for each type of coverage was different under the converted policy, some were higher, some lower. The quarterly premium under the original policy was \$66.60, the quarterly premium paid by the insured under the converted policy was \$104.30. The correct quarterly premium under the converted policy as issued would have been \$2.70 more than \$104.30. This difference is too slight to amount to proof that the insured must have known he was being charged too little. Furthermore, the correct premium does not appear anywhere on the policy.

Of course it is difficult to prove that a person

who is now deceased knew or should have known of a mistake, but defendant had the burden of proof, and failed to sustain it.

Plaintiff seeks an award of attorney's fees, claiming that the following language which appears on the face of the policy constitutes an implied agreement by defendant to pay attorney's fees:

"It is not necessary to employ any firm or person to collect the proceeds of this policy."

The California rule is clear that an award of attorney's fees must be authorized by statute or by an agreement of the parties. California Code of Civil Procedure §1021; *Williams v. Krumsiek*, 102 Cal. App. 2d 541, 545. There is no statutory authority for an attorney's fee here; the only question is whether the quoted language creates an implied liability on the part of defendant to pay attorney's fees when any policy holder has to bring an action to recover under the policy.

It is very unusual for an insurer to promise to pay attorney's fees in the event that a dispute with an insured should lead to litigation; consequently the language creating such unusual liability ought to be clear and free from ambiguity. In the opinion of this Court the quoted language is not sufficiently definite. If the clause in question was meant to apply to attorney's fees, the phrase "attorney's fees" could easily have been used. In *DeMirjian v. Ideal Heating Corp.*, 91 Cal. App. 2d 905, 911, in holding that a conventional provision for attorney's fees does not create an obligation to pay such fees in an action brought to recover damages arising

solely out of the promisor's negligence, the court said:

“If such unusual and extensive liability is to be created, it must be by clearly expressed agreement of the parties and not by means of a mere interpretation of vague, general language, such as the parties here employed.”

Accordingly, plaintiff's prayer for attorney's fees is denied.

Plaintiff, therefore, is entitled to judgment for the full balance due on the insurance policy as issued in the sum of \$8,000.00. Plaintiff is also entitled to interest on all payments which have accrued but which have not been paid. Counsel for plaintiff is directed to prepare findings, conclusions and judgment in accordance herewith.

Dated: May 12, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed May 14, 1955.

[Title of District Court and Cause.]

ORDER PERMITTING AMENDMENT
TO COMPLAINT

Plaintiff having moved for an order permitting an amendment to her Complaint, and good cause appearing therefor,

It Is Hereby Ordered that plaintiff may amend

her Complaint by filing the Amendment thereto, a copy of which is attached to her said motion.

Dated: July 6, 1955.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed July 6, 1955.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Leave of Court having been first duly obtained, plaintiff Mary Troutfelt Cohen hereby amends her complaint to add thereto a paragraph numbered 13, and to amend the prayer thereof, both as follows:

“13. Said contract of insurance provided that:

“It is not necessary to employ any firm or person to collect the proceeds of this policy.”

It has been necessary for plaintiff to employ a firm and a person, to wit, Messrs. Brobeck, Phleger & Harrison and Moses Lasky, Esq., in order to collect the proceeds of said policy, and the reasonable cost and expense thereof is \$1500.00, and plaintiff has been specially damaged as a result thereof in the sum of \$1500.00.

“Wherefore, plaintiff prays judgment against defendant in the sum of \$9,500.00, plus interest at the rate of 7% per annum to the date of entry of judgment on \$50.00 from March 1, 1954, on \$50.00 from April 1, 1954, on \$50.00 from May 1, 1954, on

\$50.00 from June 1, 1954, on \$50.00 from July 1, 1954, on \$50.00 from August 1, 1954, on \$50.00 from September 1, 1954, on \$50.00 from October 1, 1954, on \$50.00 from November 1, 1954, on \$50.00 from December 1, 1954, on \$50.00 from January 1, 1955, on \$50.00 from February 1, 1955, on \$50.00 from March 1, 1955, on \$50.00 from April 1, 1955, on \$50.00 from May 1, 1955, on \$50.00 from June 1, 1955, and on \$50.00 from July 1, 1955, for a declaration of the rights and duties of plaintiff and defendant under said policy and contract of insurance, for her costs of suit herein incurred, and for such other and further relief as may be meet and proper.”

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 6, 1955.

[Title of District Court and Cause.]

STIPULATION RE ANSWER

It Is Hereby Stipulated that defendant's answer to plaintiff's complaint, as amended, may be deemed amended to deny the allegations of paragraph 13 of said complaint as amended, provided, however, that defendant reserves its objections and excep-

tions to the order allowing plaintiff to file such amendment.

/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff.

/s/ WM. H. KEESLING,
/s/ HENRY C. CLAUSEN, JR.,
KEESLING & KEESLING,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 10, 1955.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried on February 9, 1955 before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, now makes and orders filed its Findings of Fact and Conclusions of Law, as follows:

Findings of Fact

1. At all times herein mentioned, and at the time this action was commenced and removed to this

Court, plaintiff Mary Troutfelt Cohen was and is a citizen of the State of New Mexico, and defendant John Hancock Mutual Life Insurance Company was and is a corporation duly incorporated, organized and existing under the laws of the State of Massachusetts and a citizen thereof and doing business in the State of California.

2. The matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs and is a civil action between citizens of different states.

3. At all times herein mentioned until his death, plaintiff was the wife of one Martin E. Troutfelt.

4. In 1939 defendant, as insurer, and said Troutfelt, as the insured, entered into a contract of life insurance, the terms of which are contained in defendant's policy No. 3223099 including the supplements attached thereto. Plaintiff was named beneficiary of said contract. By the terms of said contract, said Troutfelt was to pay premiums for 15 years from the effective date thereof or until his earlier death, in consideration of which defendant agreed to pay plaintiff the face amount of \$5,000 in the event of Troutfelt's death.

5. As a part of said contract, and attached to said policy No. 3223099 were several supplements, one of which was styled "Supplementary Provision for Family Income". By the terms thereof said Troutfelt was to pay additional premiums for a period of 15 years from the effective date of the contract or until his earlier death, in consideration

of which defendant agreed to make monthly payments of \$50 per month to plaintiff for a period beginning upon the first day of the month following the death of said insured and extending to and including February 1, 1959, and at the end of said period to pay to plaintiff the \$5,000 face amount referred to in paragraph 4 above.

6. Said Troutfelt duly paid, and defendant accepted, all the premiums called for by said contract, and duly performed all the conditions on his part to be performed.

7. Defendant never informed said Troutfelt that said contract or any term or part thereof was a mistake or the result of a mistake, and said Troutfelt neither knew nor suspected, nor reasonably could or should have known or suspected any mistake therein, and any mistake in writing the premium payment term in the said "Supplementary Provision for Family Income" as 15 (instead of 10) years, or in writing the income payment period therein as 20 (instead of 15) years, or in any other respect, was not a mutual mistake but was the unilateral mistake of defendant alone.

8. After the said policy No. 3223099, including said Supplementary Provision for Family Income, was prepared by defendant's scrivener, and before its issuance and delivery to said Troutfelt, it was submitted to, examined by and executed by defendant's registrar acting on his own behalf and on behalf of its president and secretary. Said policy and supplementary provision were countersigned by

said registrar and said policy, including said supplementary provision, were endorsed and executed by defendant's secretary, thus:

“This Policy is issued effective on the date of this endorsement as of its date of issue, in conversion of Policy No. 3171136, dated February 24, 1939, which is terminated as of the date of this endorsement, and in consideration of the surrender of the said Policy and the payment of Thirty Seven and 70/100 Dollars, for the cost of the said conversion.

John Hancock Mutual Life Insurance Company

By Charles J. Diman,
Secretary

Dated at Boston, Mass., July 27, 1939.”

9. In the exercise of ordinary care or reasonable diligence, defendant could have discovered its alleged mistake in 1939.

10. Upon the death of said Troutfelt in 1945 plaintiff, his beneficiary, made and delivered to defendant due proof of said Troutfelt's death and of plaintiff's claim as beneficiary, and as a part of such proof and claim, transmitted and surrendered to defendant, and defendant received, the original of said policy No. 3223099, including all supplements attached thereto. Defendant thereupon had the opportunity to read and should have read said policy, and as part of defendant's processing of said proof of death and claim, defendant, in 1945,

endorsed and executed on said policy, the following legend:

“Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income dated February 24, 1939 attached hereto.

John Hancock Mutual Life Insurance Company

By Elmer L. French, Secretary

Dated at Boston, Mass., July 26, 1945.”

And thereafter, in 1945, defendant returned said policy so endorsed to plaintiff.

12. In the exercise of ordinary care or reasonable diligence, defendant could have discovered its alleged mistake in 1945.

13. It is not true that defendant discovered its alleged mistake in 1954 but, on the contrary, it discovered its alleged mistake in 1939 or at the latest on July 26, 1945.

14. Said Troutfelt died June 28, 1945. Thereafter, defendant made monthly payments to plaintiff to and including February 1, 1954. Since February 1, 1954 defendant has failed and refused to pay plaintiff any further monthly sum, and no further sum has been paid.

15. On or about May 13, 1954 defendant notified plaintiff in writing that it “does not consider it is liable for any further monthly payments under the family income provision”, and that it would pay a

final payment of \$4,993.59 but only upon surrender of the policy. Thereby defendant committed an anticipatory breach of the said contract entered into between it and said Troutfelt.

16. Said policy No. 3223099 contains upon its face the following words: "It is not necessary to employ any firm or person to collect the proceeds of this policy". Although the Court concludes, as a conclusion of law, that plaintiff is not entitled by reason thereof to recover any attorney's fees from defendant, the Court finds as a fact that it was necessary for plaintiff to employ an attorney to commence and prosecute the present action to collect the proceeds of the policy.

17. One of the terms of said contract was and is as follows:

"This policy, except any supplementary provision hereof granting any benefit for total and permanent disability, or granting any additional insurance specifically against death caused by certain bodily injuries sustained through accidental means, shall be incontestable after it has been in force during the lifetime of the Insured for two years from its date of issue, except for non-payment of premium, and except that if the Insured's age has been misstated, the amount payable hereunder shall be that which the premium paid would have purchased at the correct age."

Said contract was in force during the lifetime of

the insured from its date of issue in 1939 to his death in 1945.

18. The allegations of paragraph 12 of the complaint are true.

From the foregoing facts the Court draws the following

Conclusions of Law

1. This Court has jurisdiction hereof.
2. Plaintiff is entitled to judgment against defendant in the sum of \$8,000, together with interest at 7% per annum until the date of entry of judgment on
 - \$50 from March 1, 1954,
 - \$50 from April 1, 1954,
 - \$50 from May 1, 1954,
 - \$50 from June 1, 1954,
 - \$50 from July 1, 1954,
 - \$50 from August 1, 1954,
 - \$50 from Sept. 1, 1954,
 - \$50 from Oct. 1, 1954,
 - \$50 from Nov. 1, 1954,
 - \$50 from Dec. 1, 1954,
 - \$50 from Jan. 1, 1955,
 - \$50 from Feb. 1, 1955,
 - \$50 from March 1, 1955,
 - \$50 from April 1, 1955, and
 - \$50 from May 1, 1955,together with her costs of suit.

3. The rights and duties of the parties are as follows: Under the contract of life insurance en-

tered into between defendant and Martin E. Troutfelt in 1939, the terms of which are contained in defendant's policy No. 3223099 including all supplements thereto, defendant was obligated to pay to plaintiff \$50 on the first day of each month after the death of said Troutfelt in 1945 to and including February 1, 1959, and thereupon to pay her the further sum of \$5,000, and upon defendant's refusal to perform said contract and its anticipatory breach thereof, plaintiff became entitled to recover said sums totaling \$8,000 together with interest on delinquent monthly payments, and her costs of suit, and defendant is entitled to nothing by reason of its counterclaim, and, particularly, is not entitled to reformation of the contract or policy in any respect.

Let judgment be entered accordingly.

Dated: May....., 1955.

.....
United States District Judge.

Disapproved.

/s/ HENRY C. CLAUSEN, JR.,
Attorney for defendant.

Lodged May 24, 1955.

[Title of District Court and Cause.]

PROPOSED JUDGMENT

The above-entitled cause having been tried on February 9, 1955 before the Honorable Oliver J.

Carter, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, and having made and filed herein its Findings of Fact and Conclusions of Law pursuant to F.R.C.P. Rule 52,

It Is Hereby Ordered, Adjudged and Decreed:

(1) The Court declares that defendant John Hancock Mutual Life Insurance Company and Martin E. Troutfelt entered into a contract of life insurance, the terms of which are contained in defendant's policy No. 3223099, including all supplements thereto, under which defendant obligated itself to pay to plaintiff Mary Troutfelt Cohen the sum of \$50 per month on the first day of every month following the death of said Troutfelt in 1945 to and including February 1, 1959, and thereupon to pay to plaintiff the additional sum of \$5,000; and that by virtue of defendant's refusal and failure to pay any monthly payments after February 1, 1954, it committed an anticipatory breach of said contract.

(2) That plaintiff Mary Troutfelt Cohen do have and recover of and from defendant John Hancock Mutual Life Insurance Company, a corporation, the sum of \$8,000 plus interest at the rate of 7% per annum to the date of entry of judgment on \$50 from March 1, 1954, on \$50 from April 1, 1954, on \$50 from May 1, 1954, on \$50 from June 1, 1954,

on \$50 from July 1, 1954, on \$50 from August 1, 1954, on \$50 from September 1, 1954, on \$50 from October 1, 1954, on \$50 from November 1, 1954, on \$50 from December 1, 1954, on \$50 from January 1, 1955, on \$50 from February 1, 1955, on \$50 from March 1, 1955, on \$50 from April 1, 1955, and on \$50 from May 1, 1955, said interest totaling \$., together with plaintiff's costs of suit herein incurred to be taxed in the manner provided by law and the rules of the court, the entire judgment to bear interest from the date of entry of judgment at the rate of 7% per annum until paid.

(3) That defendant is entitled to no relief, and that it take nothing by reason of its counterclaim.

Dated this day of May, 1955.

.....
United States District Judge.

Disapproved.

/s/ HENRY C. CLAUSEN, JR.,
Attorney for Defendant.

Lodged May 24, 1955.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED MODIFICATIONS TO FINDINGS OF FACT AND CONCLU- SIONS OF LAW AND JUDGMENT

Pursuant to Rule 21 of the General Rules of Practice, District Court of the United States, Northern District of California, defendant proposes the following amendments to the proposed Find-

ings of Fact and Conclusions of Law and Judgment submitted by plaintiff:

Findings of Fact

I.

Page 2, following paragraph 3, the following paragraph should be inserted:

“On February 24, 1939, after written application of the said Martin E. Troutfelt, defendant issued and delivered to him its policy numbered 3171136 for ordinary life insurance in the face amount of \$5,000.00, maturing on death, with premiums payable for twenty years with supplementary provision for family income. Said provision required the insured to pay an additional premium for fifteen years, and provided for monthly payments to the beneficiary for a period not to exceed twenty years from the date of the policy, only in the event of the death of the insured within twenty years from the date of the policy.”

Reason: To accord with the evidence and memorandum opinion.

II.

Page 2, paragraph 4, delete and substitute:

“Within a few months after the original policy was issued, said Martin Troutfelt made written application for conversion of the main policy to a fifteen year endowment policy and for a family income rider under which said insured would pay an additional premium for ten years, and his beneficiary would receive monthly payments for a period

not to exceed fifteen years from the date of the policy if the insured died within fifteen years from the date of the policy.”

Reason: To accord with the evidence and memorandum opinion.

III.

Page 2, paragraph 5, delete and substitute:

“In issuing the new policy, numbered 3223099, defendant’s scrivener and officers and agents made a clerical mistake in the family income rider. The rider actually issued provided for the payment of an additional premium for fifteen years (instead of ten), and for monthly benefits for a period not to exceed twenty years (instead of fifteen years) from the date of the policy if the insured died within twenty years from the date of the policy.”

Reason: To accord with the evidence and memorandum opinion.

IV.

Page 3, paragraph 6, delete and substitute:

“From the date of issuance of said policy to and including the date of the insured’s death the defendant charged the insured a premium that was correct for the rider applied for, but was ten dollars per year less than the correct premium for the rider as issued. The insured duly paid, and defendant accepted said premium, and said insured duly performed all the conditions on his part to be performed.”

Reason: To accord with the evidence and memorandum opinion.

V.

Page 4, following paragraph 8, insert the following additional paragraph:

“The application for Policy No. 3223099 was made in New Mexico; premiums were paid from there; the said policy was delivered there; the contract was to be performed in New Mexico; and at all of said times, said insured was a resident of New Mexico.”

Reason: To accord with the evidence and to fix the applicable state law.

VI.

Page 4, paragraph 9, delete the entire paragraph, and substitute:

“In the exercise of ordinary care or reasonable delegence, defendant could not have discovered its mistake in 1939.”

Reason: The evidence is that defendant's only record of the policy applied for and the policy issued was the application of the insured; defendant did not, and does not customarily, retain copies of the rider actually issued; plaintiff never made claim to an additional five years family income until 1954; therefore defendant did not have any reasonable means of discovering the clerical mistake until after the death of the insured.

VII.

Page 4, paragraph 9, delete the entire paragraph.

Reason: To accord with the evidence and the memorandum opinion.

VIII.

Page 4, paragraph 13, delete the entire paragraph.

Reason: To accord with the evidence and the memorandum opinion.

IX.

Page 5, paragraph 15, delete "Thereby defendant committed an anticipatory breach of the said contract entered into between it and said Troutfelt."

Reason: The doctrine of anticipatory breach does not apply to actions for breach of an insurance contract payable in installments. See *Brix vs. Peoples Mut. Life Ins. Co.*, 2 Cal. 2d. 446.

X.

Page 5, paragraph 16, delete the entire paragraph.

Reason: To accord with the memorandum opinion; furthermore it is an immaterial finding.

XI.

Page 5, paragraph 17, delete the entire paragraph.

Reason: Immateriality, and to accord with the memorandum opinion.

Conclusions of Law

I.

Page 6, following paragraph 1, add the following paragraph:

"Defendant's defense of mistake is barred by the provisions of Sec. 338(4) of the California Code of Civil Procedure."

II.

Page 6, paragraph 2, delete "in the sum of \$8,000.00."

Reason: The doctrine of anticipatory breach does not apply to actions for breach of an insurance contract payable in installments. See *Brix v. Peoples Mut. Life Ins. Co.*, 2 Cal., 2d. 446.

III.

Page 6, paragraph 3, delete the entire paragraph and substitute therefor the following:

"The rights and duties of the parties are as follows: Defendant is obligated to pay to plaintiff \$50 on the first day of each month to and including February 1, 1959, and thereupon to pay her the further sum of \$5,000.00, together with all accrued payments from February 1, 1954, interest thereon, and her costs of suit, and defendant is entitled to nothing by reason of its counterclaim, and, particularly, is not entitled to reformation of the contract or policy in any respect."

Reason: To accord with the findings of fact that defendant is barred from proving the true contract of the parties.

Judgment

I.

Page 1, paragraph (1), delete.

Reason: To accord with proposed modifications of conclusions of law.

II.

Page 2, paragraph (2), line 11, delete: "the sum

of \$8,000'' and insert: "The following principal sums."

Reason: To accord with the proposed modifications of conclusions of law.

Dated: May 31, 1955.

KEESLING & KEESLING,
WILLIAM H. KEESLING,
HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,

/s/ By HENRY C. CLAUSEN, JR.,
Attorneys for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 31, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried on February 9, 1955, before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, now makes and orders filed its Findings of Fact and Conclusions of Law, as follows:

Findings of Fact

1. At all times herein mentioned, and at the

time this action was commenced and removed to this Court, plaintiff Mary Troutfelt Cohen was and is a citizen of the State of New Mexico, and defendant John Hancock Mutual Life Insurance Company was and is a corporation duly incorporated, organized and existing under the laws of the State of Massachusetts and a citizen thereof and doing business in the State of California.

2. The matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs and is a civil action between citizens of different states.

3. At all times herein mentioned until his death, plaintiff was the wife of one Martin E. Troutfelt.

4. In 1939 defendant, as insurer, and said Troutfelt, as the insured, entered into a contract of life insurance, the terms of which are contained in defendant's policy No. 3223099 including the supplements attached thereto. Plaintiff was named beneficiary of said contract. By the terms of said contract, said Troutfelt was to pay premiums for 15 years from the effective date thereof or until his earlier death, in consideration of which defendant agreed to pay plaintiff the face amount of \$5,000 in the event of Troutfelt's death.

5. As a part of said contract, and attached to said policy No. 3223099 were several supplements, one of which was styled "Supplementary Provision for Family Income." By the terms thereof said Troutfelt was to pay additional premiums for a period of 15 years from the effective date of the contract or until his earlier death, in consideration

of which defendant agreed to make monthly payments of \$50 per month to plaintiff for a period beginning upon the first day of the month following the death of said insured and extending to and including February 1, 1959, and at the end of said period to pay to plaintiff the \$5,000 face amount referred to in paragraph 4 above.

6. Said Troutfelt duly paid, and defendant accepted, all the premiums called for by said contract, and duly performed all the conditions on his part to be performed.

7. Defendant never informed said Troutfelt that said contract or any term or part thereof was a mistake or the result of a mistake, and said Troutfelt neither knew nor suspected, nor reasonably could or should have known or suspected, any mistake therein, and any mistakes in writing the premium payment term in the said "Supplementary Provision for Family Income" as 15 (instead of 10) years, or in writing the income payment period therein as 20 (instead of 15) years, or in any other respect, was not a mutual mistake but was the unilateral mistake of defendant alone.

8. After the said policy No. 3223099, including said Supplementary Provision for Family Income, was prepared by defendant's scrivener, and before its issuance and delivery to said Troutfelt, it was submitted to, examined by and executed by defendant's registrar acting on his own behalf and on behalf of its president and secretary. Said policy and supplementary provision were countersigned

by said registrar and said policy, including said supplementary provision, were endorsed and executed by defendant's secretary, thus:

"This Policy is issued effective on the date of this endorsement as of its date of issue, in conversion of Policy No. 3171136, dated February 24, 1939, which is terminated as of the date of this endorsement, and in consideration of the surrender of the said Policy and the payment of Thirty Seven and 70/100 Dollars, for the cost of the said conversion.

John Hancock Mutual Life Insurance Company

By Charles Diman,
Secretary

Dated at Boston, Mass., July 27, 1939."

9. In the exercise of ordinary care or reasonable diligence, defendant could have discovered its alleged mistake in 1939.

10. Upon the death of said Troutfelt in 1945 plaintiff, his beneficiary, made and delivered to defendant due proof of said Troutfelt's death and of plaintiff's claim as beneficiary, and as a part of such proof and claim, transmitted and surrendered to defendant, and defendant received, the original of said policy No. 3223099, including all supplements attached thereto. Defendant thereupon had the opportunity to read and should have read said policy, and as part of defendant's processing of said proof of death and claim, defendant, in 1945,

endorsed and executed on said policy, the following legend:

“Insured died June 28, 1945. Settlement in accordance with Supplementary Provision for Family Income dated February 24, 1939 attached hereto.

John Hancock Mutual Life Insurance Company

By Elmer L. French, Secretary

Dated at Boston, Mass., July 26, 1945.”

And thereafter, in 1945, defendant returned said policy so endorsed to plaintiff.

11. In the exercise of ordinary care or reasonable diligence, defendant could have discovered its alleged mistake in 1945.

12. It is not true that defendant discovered its alleged mistake in 1954 but, on the contrary, it discovered its alleged mistake in 1939 or at the latest on July 26, 1945.

13. Said Troutfelt died June 28, 1945. Thereafter, defendant made monthly payments to plaintiff to and including February 1, 1954. Since February 1, 1954 defendant has failed and refused to pay plaintiff any further monthly sum, and no further sum has been paid.

14. On or about May 13, 1954, defendant notified plaintiff in writing that it “does not consider it is liable for any further monthly payments under the family income provision,” and that it

would pay a final payment of \$4,993.59 but only upon surrender of the policy. Thereby defendant committed an anticipatory breach of the said contract entered into between it and said Troutfelt.

15. Said contract was in force during the lifetime of the insured from its date of issue in 1939 to his death in 1945.

16. The allegations of paragraph 12 of the complaint are true.

From the foregoing facts the Court draws the following

Conclusions of Law

1. This Court has jurisdiction hereof.

2. Plaintiff is entitled to judgment against defendant in the sum of \$8,000, together with interest at 7% per annum until the date of entry of judgment on

\$50 from 3/1/54	\$50 from 3/1/55	\$50 from 3/1/56
\$50 from 4/1/54	\$50 from 4/1/55	\$50 from 4/1/56
\$50 from 5/1/54	\$50 from 5/1/55	\$50 from 5/1/56
\$50 from 6/1/54	\$50 from 6/1/55	\$50 from 6/1/56
\$50 from 7/1/54	\$50 from 7/1/55	\$50 from 7/1/56
\$50 from 8/1/54	\$50 from 8/1/55	\$50 from 8/1/56
\$50 from 9/1/54	\$50 from 9/1/55	\$50 from 9/1/56
\$50 from 10/1/54	\$50 from 10/1/55	\$50 from 10/1/56
\$50 from 11/1/54	\$50 from 11/1/55	\$50 from 11/1/56
\$50 from 12/1/54	\$50 from 12/1/55	\$50 from 12/1/56
\$50 from 1/1/55	\$50 from 1/1/56	\$50 from 1/1/57
\$50 from 2/1/55	\$50 from 2/1/56	\$50 from 2/1/57
		and \$50 from 3/1/57

together with her costs of suit.

3. The rights and duties of the parties are as follows: Under the contract of life insurance en-

tered into between defendant and Martin E. Troutfelt in 1939, the terms of which are contained in defendant's policy No. 3223099 including all supplements thereto, defendant was obligated to pay to plaintiff \$50 on the first day of each month after the death of said Troutfelt in 1945 to and including February 1, 1959, and thereupon to pay her the further sum of \$5,000, and upon defendant's refusal to perform said contract and its anticipatory breach thereof, plaintiff became entitled to recover said sums totaling \$8,000 together with interest on delinquent monthly payments, and her costs of suit, and defendant is entitled to nothing by reason of its counterclaim, and, particularly, is not entitled to reformation of the contract or policy in any respect.

Let judgment be entered accordingly.

Dated: March 20, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed March 20, 1957.

In The United States District Court, Northern
District of California, Southern Division

No. 33864

MARY TROUTFELT COHEN, Plaintiff,

v.

JOHN HANCOCK MUTUAL LIFE INSUR-
ANCE COMPANY, a corporation,
 Defendant.

JUDGMENT

The above-entitled cause having been tried on February 9, 1955 before the Honorable Oliver J. Carter, United States District Judge, sitting without a jury, and the respective parties being represented by counsel, and the Court having received evidence, both oral and documentary, and having heard oral argument and considered the briefs of the parties, and having made and filed herein its Findings of Fact and Conclusions of Law pursuant to F.R.C.P. Rule 52,

It Is Hereby Ordered, Adjudged and Decreed:

(1) The Court declares that defendant John Hancock Mutual Life Insurance Company and Martin E. Troutfelt entered into a contract of life insurance, the terms of which are contained in defendant's policy No. 3223099, including all supplements thereto, under which defendant obligated itself to pay to plaintiff Mary Troutfelt Cohen the sum of \$50 per month on the first day of every

month following the death of said Troutfelt in 1945 to and including February 1, 1959, and thereupon to pay to plaintiff the additional sum of \$5,000; and that by virtue of defendant's refusal and failure to pay any monthly payments after February 1, 1954, it committed an anticipatory breach of said contract.

(2) That plaintiff Mary Troutfelt Cohen do have and recover of and from defendant John Hancock Mutual Life Insurance Company, a corporation, the sum of \$8,000 plus interest at the rate of 7% per annum to the date of entry of judgment on \$50 from March 1, 1954, on \$50 from April 1, 1954, on \$50 from May 1, 1954, on \$50 from June 1, 1954, on \$50 from July 1, 1954, on \$50 from August 1, 1954, on \$50 from September 1, 1954, on \$50 from October 1, 1954, on \$50 from November 1, 1954, on \$50 from December 1, 1954, on \$50 from January 1, 1955, on \$50 from February 1, 1955, on \$50 from March 1, 1955, on \$50 from April 1, 1955, on \$50 from May 1, 1955, on \$50 from June 1, 1955, on \$50 from July 1, 1955, on \$50 from August 1, 1955, on \$50 from September 1, 1955, on \$50 from October 1, 1955, on \$50 from November 1, 1955, on \$50 from December 1, 1955, on \$50 from January 1, 1956, on \$50 from February 1, 1956, and on \$50 from March 1, 1956, on \$50 from April 1, 1956, on \$50 from May 1, 1956, on \$50 from June 1, 1956, on \$50 from July 1, 1956, on \$50 from August 1, 1956, on \$50 from September 1, 1956, on \$50 from October 1, 1956, on \$50 from November 1, 1956, on \$50 from December 1, 1956, on \$50 from Janu-

ary 1, 1957, on \$50 from February 1, 1957, and on \$50 from March 1, 1957, said interest totaling \$201.34, together with plaintiff's costs of suit herein incurred in the sum of \$61.10, the entire judgment to bear interest from the date of entry of judgment at the rate of 7% per annum until paid.

(3) That defendant is entitled to no relief, and that it take nothing by reason of its counterclaim.

Dated this 20th day of March, 1957.

/s/ OLIVER J. CARTER,

United States District Judge.

Entered in Civil Docket 3/20/57.

[Endorsed]: Filed March 20, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John Hancock Mutual Life Insurance Company, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 20, 1957.

Dated: March 27, 1957.

HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,
KEESLING & KEESLING,
WILLIAM H. KEESLING,

/s/ By HENRY C. CLAUSEN,

Attorneys for Defendant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Whereas, the Defendant, John Hancock Mutual Life Insurance Company, in the above-entitled action has appealed to the United States Court of Appeals for the Ninth Circuit from a judgment made and entered against said Defendant in said action, in said District Court, in favor of the plaintiff in said action, on the 20th day of March, 1957 for the sum of \$8,000 plus interest at the rate of 7% per annum to the date of entry of judgment on \$50 from March 1, 1954, on \$50 from April 1, 1954, on \$50 from May 1, 1954, on \$50 from June 1, 1954, on \$50 from July 1, 1954, on \$50 from August 1, 1954, on \$50 from September 1, 1954, on \$50 from October 1, 1954, on \$50 from November 1, 1954, on \$50 from December 1, 1954, on \$50 from January 1, 1955, on \$50 from February 1, 1955, on \$50 from March 1, 1955, on \$50 from April 1, 1955, on \$50 from May 1, 1955, on \$50 from June 1, 1955, on \$50 from July 1, 1955, on \$50 from August 1, 1955, on \$50 from September 1, 1955, on \$50 from October 1, 1955, on \$50 from November 1, 1955, on \$50 from December 1, 1955, on \$50 from January 1, 1956, on \$50 from February 1, 1956, and on \$50 from March 1, 1956, on \$50 from April 1, 1956, on \$50 from May 1, 1956, on \$50 from June 1, 1956, on \$50 from July 1, 1956, on \$50 from August 1, 1956, on \$50 from September 1, 1956, on \$50 from October 1, 1956, on \$50 from

November 1, 1956, on \$50 from December 1, 1956, on \$50 from January 1, 1957, on \$50 from February 1, 1957, and on \$50 from March 1, 1957, said interest totaling \$201.34, together with plaintiff's costs of suit herein incurred in the sum of \$61.10, the entire judgment to bear interest from the date of entry of judgment at the rate of 7% per annum until paid.

Whereas, The Appellant is desirous of staying the execution of the said Judgment so appealed from.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, John Hancock Mutual Life Insurance Company, as Principal, and American Surety Company of New York, a corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, as Surety, do hereby acknowledge themselves justly bound in the sum of Ten Thousand and No/100 (\$10,000.00) Dollars jointly and severally, firmly by these presents, to the effect that if the said judgment so appealed from or any part thereof, be affirmed, or the appeal be dismissed, the Appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all such costs, interest and damages as the Appellate Court may adjudge and award.

And, Further, it is expressly understood and

agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter, may, upon notice to the American Surety Company of New York, of not less than ten (10) days proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

In Witness Whereof, the seal and signature of said Principal is hereto affixed and the corporate name of the said Surety is hereto affixed by its duly authorized officer at San Francisco, California, this 27th day of March, 1957.

JOHN HANCOCK LIFE MUTUAL
INSURANCE COMPANY,

/s/ By HENRY C. CLAUSEN, JR.

[Seal] AMERICAN SURETY COMPANY
OF NEW YORK,

/s/ By F. E. BUCKINGHAM,
Res. Vice President

Attest:

/s/ E. C. SCHOLZ,
Res. Asst. Secretary.

Approved: This 27th day of March, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

Notary's Certification Attached.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Mary Troutfelt Cohen, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 20, 1957 solely in respect of its failure to award to plaintiff any damages on account of defendant's breach of its written warranty that:

"It is not necessary to employ any firm or person to collect the proceeds of this policy."

/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON,

Attorneys for Plaintiff-Appellant Mary Troutfelt Cohen.

[Endorsed]: Filed April 8, 1957.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, the plaintiff in the above-entitled action is about to appeal to the United States Court of Appeals for the Ninth Circuit, from a judgment entered in said action solely in respect of the failure of said judgment to award any damages to plaintiff on account of defendant's breach of the warranty set out in plaintiff's Notice of Appeal,

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned American

Surety Company of New York, a corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the plaintiff that the said plaintiff will pay all costs which may be awarded against her on her appeal, or on a dismissal thereof, not exceeding the sum of Two Hundred Fifty (\$250.00) Dollars, to which it acknowledges itself bound.

In case of a breach of any condition hereof, the above-mentioned Court may, upon notice to said American Surety Company of New York, surety hereunder, of not less than ten days, proceed summarily in the above-entitled action or proceeding to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor.

In Witness Whereof, the corporate seal and name of said surety company is hereto affixed and attested at San Francisco, California, by its duly authorized officers, this 4th day of April, 1957.

AMERICAN SURETY COMPANY
OF NEW YORK,

/s/ By F. E. BUCKINGHAM,
Res. Vice President.

Attest:

/s/ E. C. SCHOLZ,
Res. Assistant Secretary.

Bond #35-570-270

Premium \$10.00 Term

Notary's Certificate Attached.

Authority of Signers for Surety Attached.

[Endorsed]: Filed April 8, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

It appearing to the Court that, due to illness, the reporters' transcript of proceedings in the above case has been delayed in transcribing, it is

Ordered that the time for docketing the record on appeal in the United States Court of Appeals for the Ninth Circuit, be extended to June 24, 1957.

Dated: April 19, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed April 19, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the origi-

nals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant, Except there is no reporters' transcript of proceedings included for the reason it has not been filed in this office.

Excerpt from Docket Entries.

Petition for Removal with complaint and summons attached.

Bond on Removal.

Answer and Counterclaim of Defendant.

Request of Plaintiff for Admissions by Defendant.

Response of Defendant to Request for Admissions.

Interrogatories by Plaintiff to Defendant.

Reply of Plaintiff to Counterclaim of Defendant.

Answer of Defendant to Interrogatories by Plaintiff.

Statement of Admitted Facts by Plaintiff.

Memorandum Order of Court.

Order Permitting Amendment to Complaint.

Amendment to Complaint.

Stipulation re Answer.

Findings of Fact and Conclusions of Law Lodged by Plaintiff.

Judgment Lodged by Plaintiff.

Proposed Modifications to Findings, Conclusions and Judgment, filed by Defendant.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal by Defendant.

Supersedeas Bond of Defendant.

Designation of Record on Appeal, by Defendant.

Notice of Appeal by Plaintiff.

Appeal Bond by Plaintiff.

Statement of Plaintiff Respecting Designation of Record on Appeal.

Order Extending Time to Docket Record on Appeal.

Plaintiff's Exhibit 1.

Defendant's Exhibit A.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 24th day of June, 1957.

[Seal] C. W. CALBREATH,
 Clerk.

/s/ By MARGARET P. BLAIR,
 Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying document, listed below, is the original filed in this Court in the above-entitled case and constitutes a supplemental record on appeal herein as designated by counsel:

Reporter's transcript of proceedings on settlement of findings, June 24, 1955.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of July, 1957.

[Seal] C. W. CALBREATH,
 Clerk.

/s/ By MARGARET P. BLAIR,
 Deputy Clerk.

The United States District Court, Northern
District of California, Southern Division

No. 33864

MARY TROUTFELT COHEN, Plaintiff,

vs.

JOHN HANCOCK MUTUAL LIFE INS. CO.,
a corp., Defendant.

REPORTER'S TRANSCRIPT

February 9, 1955

Before: Honorable Oliver J. Carter, Judge.

Appearances: For the Plaintiff: Messrs. Brobeck, Phlegar & Harrison, represented by Richard Haas, Esq. For Defendant: Messrs. Keesling & Keesling & Clausen, represented by Henry Clausen, Jr., Esquire, and Richard Burns, Esquire. [1]*

The Clerk: Cohen versus John Hancock Mutual Insurance Company for trial.

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

Mr. Haas: Ready for the Plaintiff, your Honor.

Mr. Clausen: Ready for the Defendant, your Honor.

The Court: All right. I gather from the pleadings this is an action on an insurance policy.

Mr. Haas: Correct.

The Court: Now, would you make a statement as to the nature of the case so that I can have the advice of counsel as to what the points in issue are.

Mr. Haas: Ready, your Honor.

The Court: I read the complaint briefly and the answer and counsel's claims, but I haven't had a chance to review all the admissions or requests for admissions and the answers thereto.

Mr. Haas: In that connection, your Honor, I should like to file at this time a statement prepared by me of the admitted facts.

The Court: All right.

Mr. Haas: I have served a copy on counsel. I think it may assist your Honor in seeing what the admitted facts are without having to thumb through all the papers in the file.

The Court: Well, thank you very much. [2]

Mr. Haas: This is an action on a written life insurance policy. The plaintiff is the widow and the beneficiary of the insured. The insured's name was George E. Troutfelt, T-r-o-u-t-f-e-l-t. The plaintiff was remarried and now her name is Cohen. The defendant is the insurance company.

The action was begun in the State courts and it is here by removal. In that connection it is an admit-

ted fact that the defendant is a Massachusetts corporation. It is alleged in the petition for removal that the plaintiff, Mrs. Cohen, is a citizen of New Mexico, and that is the fact and we so stipulate.

The dispute, your Honor, concerns the obligation of the insurance company under the rider to the policy, which is called a supplementary provision for family income. That is Exhibit 1 to the complaint. A photostatic copy of this supplementary provision is there attached. This is admitted to be the provision as written and delivered to the insured.

That supplementary provision reads in material part:

“That if after payment of the initial premiums under the policy and this supplementary provision and before default in the payment of any subsequent premiums, the death of the insured shall occur within 20 years from the date hereof—” and parenthetically, the date hereof is February 24, 1939, so that 20 years from that date is February 24th, 1958 or 9— [3] “the company, upon receipt of due proof on the company’s prescribed forms of the death of the insured, will in lieu of immediate payment of the amount insured in one sum, which is the face amount of the policy or \$5,000, pay to the beneficiary named in the policy—” that is the plaintiff—“if living, or to such other beneficiary as may be finally substituted under the conditions of the policy, on the first day of each policy month following the death of the insured, a monthly income

which shall consist of interest of so much per month plus an annuity of so much per month, the last monthly income payment to be made on the first day of the policy month directly preceding the expiration of 20 years from the date of the issue of this provision."

Now that is wherein the dispute lies.

The insurance company—let me back up chronologically.

The policy was taken out in 1939. In 1945 the insured died. This is admitted. It is further admitted that the plaintiff then submitted due proof of claim; that she submitted the original policy to the life insurance company; that they stamped thereon and their secretary signed an endorsement which reads:

"Insured died June 28, 1945. Settlement in [4] accordance with supplementary provision for family income dated February 24, 1939, attached hereto. John Hancock Mutual Life Insurance Company, by Elmer L. French, Secretary, dated at Boston, Massachusetts, July 26, 1945."

The insurance company then began to pay monthly income to the widow. And at the expiration of 15 years from the date of issuance of the policy, to-wit, on the 1st of February, 1954, the insurance company made a payment of monthly income and notified the beneficiary that there would be no more monthly income.

The Court: When was that date paid, the income, to when?

Mr. Haas: They paid it to February 1st, 1954. Is that correct?

Mr. Clausen: That is correct.

The Court: And that's the 15 year?

Mr. Haas: That is 15 years. Your Honor will notice that the provision on its face says that they will pay for 20 years.

The Court: Yes.

Mr. Haas: The supplementary provision as written also provides "that the special premium for the annuity and the special premium for the total and permanent disability provision will be payable in addition to and under the same conditions as the regular premium under the policy during 15 years from the date of issuance of this provision." [5] That is as written, the insured was to pay a special extra premium for 15 years in return for which the insurance company was to pay monthly income to his widow for 20 years, each of those periods being calculated from the date of issuance of the policy.

Now, there is no claim in this case, as I understand it, that there is anything ambiguous or uncertain about the language of this provision. The insurance company's defense is that the insertion in this form of the figures "20 for payments and 15 for premium payments" was a scrivener's mistake.

The Court: On a clerical mistake?

Mr. Haas: Or a clerk, which is supposed to be mutual although I have a lot of trouble seeing how it to be mutual——

The Court: The allegation is that it is a mutual mistake of fact. But it is also alleged that an error was made by the scrivener?

Mr. Haas: Yes, sir.

The Court: The further contention, as I understand it, is that what they are offering to do is pay in accordance with the application paid by the insured——

Mr. Haas: That is correct.

The Court: Rather than in accordance with the policy which is their contention was a mistake.

Mr. Haas: Of course, it goes without saying that the fact that they made a mistake is irrelevant, unless they can show—and they have the burden of proof on the issue, not by [6] a mere preponderance of the evidence—but by clear and convincing evidence that this mistake was one which was shared by the insured; that is, he either knew or suspected that there was a mistake.

Of course, we deny that there was any mistake at all, the mistake by the scrivener or any mistake at all. And we also deny that there was any mistake which the insured either knew or suspected.

Now, would you mark this as Plaintiff's Exhibit 1 for identification?

The Court: All right. I presume that is the policy.

(Whereupon the original policy No. 3223099 was marked Plaintiff's Exhibit No. 1 for identification.)

Mr. Haas: I presume—although I don't know

that counsel will stipulate that this is the original policy?

Mr. Clausen: That's right. And it may be well to attach the original application.

Mr. Haas: I suggest that you put that in as part of your own case, counsel. Will you stipulate that Plaintiff's Exhibit 1 for identification is the policy on which the action was brought? We will offer Plaintiff's 1 in evidence.

The Court: It will be admitted into evidence as Plaintiff's Exhibit 1. The original has the supplement on it?

Mr. Haas: Yes, your Honor.

(The original policy No. 3223099 previously marked Plaintiff's Exhibit No. 1 for identification was received in evidence.) [7]

Mr. Haas: If I may approach the bench?

The Court: Yes.

Mr. Haas: It is one of many pieces of paper attached hereto.

The Court: Yes, I see. Well, I just wanted to be sure that the Exhibit 1 included the supplement as well as the original policy.

Is it Policy 311 or 322—

Mr. Clausen: That is the subsequent policy.

The Court: It really is a substitute policy, isn't it, with the rider attached?

Mr. Haas: It is a policy, your Honor, which was issued in exchange for another policy.

The Court: That's right.

Mr. Haas: But the other policy is not the policy sued on. This is the policy sued on.

The Court: I understand that.

Mr. Hass: Now, I should like to read into evidence certain requests for admissions served by plaintiff on defendant and the responses thereto.

“Defendant’s response to requests for admission No. 1: Defendant admits that Exhibit A attached to Plaintiff’s Request for Admissions on file herein is a true copy of Defendant’s Policy No. 3223099, together with all written [8] attachments thereto as executed, and delivered in 1939 by defendant to Martin Troutfelt and received by him.”

We will offer that response in evidence.

The Court: It may be admitted into evidence. I don’t think it has to be marked as an Exhibit.

Mr. Haas: No, your Honor. I just read it into the record so it will be in the record in evidence.

The Court: Yes.

(Whereupon the above mentioned document was agreed upon as being already in evidence.)

Mr. Haas: We will offer in evidence Defendant’s response to request for admission number 2, which reads as follows:

“Defendant admits that upon the death of Martin E. Troutfelt in 1945, plaintiff, his beneficiary, (a) transmitted to defendant the original of said Exhibit A and defendant received the same; (b) made and delivered to defendant due proof of the insured’s death and of plaintiff’s claim as beneficiary; (c) transmitted and surrendered the original of

said Exhibit A to defendant and a part of such proof and claim.”

We will offer defendant’s response No. 2 in evidence.

The Court: It may be admitted.

(Whereupon the foregoing document was admitted into evidence as described above.) [9]

Mr. Haas: Defendant’s response to request for admission No. 3.

“Defendant admits that thereafter in 1945 it executed and endorsed upon the original of Exhibit A the legend set forth in Paragraph 5 of the Complaint herein and, so endorsed and returned it to Plaintiff.”

We offer Defendant’s Response No. 3 in Evidence.

The Court: It will be admitted.

(Whereupon the foregoing document was admitted into evidence as described hereinabove.)

Mr. Haas: Defendant’s Response No. 4.

“Defendant admits that execution and endorsement of said legend occurred as part of processing said proof of death and claim.”

We will offer Defendant’s Response No. 4 in Evidence.

The Court: It may be admitted.

(Whereupon the foregoing Response was admitted into evidence as described hereinabove.)

Mr. Haas: Defendant’s Response No. 6.

“Defendant admits that Martin E. Troutfelt was the insured and the defendant the insurer in the contract of insurance entered into between them.

We will offer Defendant's Response No. 6 in Evidence.

The Court: It is admitted. [10]

(Whereupon the foregoing Defendant's Response No. 6 was admitted into evidence as described hereinabove.)

Mr. Haas: Defendant's Response No. 7 reads:

"Defendant admits that said policy including the supplementary provisions and all applications attached thereto was written on forms prepared by defendant."

We will offer Defendant's Response No. 7 in Evidence.

The Court: It may be admitted.

(Whereupon the foregoing Defendant's Response No. 7 was admitted into evidence as described hereinabove.)

Mr. Haas: Now Request for Admission No. 8 propounded by Plaintiff to Defendant reads as follows:

"Admit that the written supplementary provisions for family income attached to said Exhibit A was wholly prepared by defendant and that Martin E. Troutfelt had no part in its preparation."

The Defendant's response to that request for admission reads as follows:

"Defendant admits that the written supplementary provision for family income attached to said Exhibit A was wholly prepared by defendant from the application therefore made by [11] Martin E. Troutfelt, dated July 11th, 1939 at Albuquerque, New Mexico."

We first move to strike from the response the words, "from the application therefore made by Martin E. Troutfelt dated July 11th, 1939, at Albuquerque, New Mexico," and offer the balance of Defendant's Response No. 8 in Evidence with those words stricken therefrom.

The Court: What is the position of the Defendant?

Mr. Clausen: Concurred, your Honor. I will agree to it.

Mr. Haas: Those words may go out?

The Court: They may be stricken then. And as stricken, the answer to the Request for Admission will be admitted into Evidence.

(Whereupon the foregoing Defendant's Response No. 8 was admitted into evidence as described hereinabove.)

Mr. Haas: Plaintiff's Request for Admission No. 9 reads as follows:

"That after receipt by Defendant from Martin E. Troutfelt of the two applications, one dated May 31st, 1939 and the other dated July 11th, 1939, copies of which are attached to said Exhibit A, no authorized representative of defendant orally informed Martin E. Troutfelt that the defendant bound and committed itself to issue a policy of insurance."

In response to this request the Defendant in its response, [12] Paragraph 9 states, "Defendant is without knowledge or information as to the facts on which it can truthfully admit or deny Plaintiff's

Request No. 9 inasmuch as the writing agent on the policy, George E. Troutfelt, left the service of the company on February 13th, 1946."

It is our position, your Honor, and we offer into Evidence as admitted, Plaintiff's request for Admission No. 9; that this answer is no answer at all; that is, it has not been denied and therefore stands admitted because the reason given for failure to admit or deny is wholly insufficient. That is, we offer Plaintiff's Request for Admission No. 9 in Evidence on the ground that it has been admitted as written by the Defendant's response thereto.

Mr. Clausen: To which I will object, your Honor. The question is so ambiguous, it calls for such a scope of knowledge upon the part of the company that it could be answered in no other way.

The Court: Now——

Mr. Clausen: "No authorized representative of defendant orally informed—". This company has thousands of employees.

The Court: Well, it may have thousands of employees, but the point is do you make any contention that there was any oral information given to him. That is what they want to know.

Mr. Haas: It would seem to me——

Mr. Clausen: He wants the company to admit that? [13]

Mr. Haas: That no authorized representative of Defendant orally informed Martin E. Troutfelt that the Defendant bound and committed itself to issue a policy of insurance. That is what we ask you to

admit to which you respond, "George Troutfelt, the writing agent, left the service of the company some time ago."

First, your Honor, I think that the position counsel now takes is one that ought to have been taken as an objection to the Request for Admission.

And secondly, we are not asking for the Defendant here to run out and talk to everybody employed by the Defendant for this reason, "That no person except the President, a Vice President, the Secretary, or an Assistant Secretary is authorized to waive, alter, modify, or change any of the conditions or the provisions of this policy including this provision, or of any indorsements thereon, or to waive for the future thereof, or to extend credit for the time or any payment or any premiums for any monies due to the company, or to bind it by making any statement or receiving at any time any notice of information not contained in the application for this policy."

So when we ask them to admit that no authorized representative of the Defendant orally informed Martin E. Troutfelt that the Defendant bound and commits itself, we are just asking them what did the corporation do as within the limits of the policy, within its agents' limits. [14]

Thirdly, there is no showing made that the Defendant has not, in fact, discussed this matter with George E. Troutfelt, the person—the writing agent who left the service of the company and in whose absence therefrom they state this "No knowledge or information" answer.

And it's our information that the Defendant's attorneys have in fact talked to Troutfelt. Now if that is the situation, I don't see how they can genuinely put in that "No knowledge or information," response to a request for admission.

That is, their reason is simply insufficient: "We can't answer because Troutfelt who wrote the policy isn't with us any more."

The Court: The thing is, I presume—and I am trying to gather the relative importance of this——

Mr. Clausen: I don't——

The Court: This provision, it's a negative approach. I mean, you are trying to——

Mr. Haas: I am trying to show, your Honor, and I think I can show from this response and the one that follows it, that the first thing that Troutfelt knew—the first indication of willingness on the part of the Defendant to insure him—was when he received the policy.

You see, we are going to get—we have a situation here in which the insured signed an application for a particular kind of policy. The company sends him a different kind of [15] policy.

Now the question is when he made that application did some authorized agent of the insurance company say, "That's your contract, you have got a contract right now."

How was the contract formed? That may be very important in this case. We simply seek to show that the first thing Troutfelt knew about any contract was when he received this piece of paper.

Mr. Clausen: May I have a word, your Honor?

The Court: Yes.

Mr. Clausen: The request not only asks for information of such a wide scope that the Defendant could not honestly answer question or ask for a legal opinion.

Mr. Hass: Why didn't you object to it then, counsel, when it was proposed and give us an opportunity to draft a Request for Admission that would have satisfied those objections?

Mr. Clausen: At the time this Response was made, the answer was true. I will state this to your Honor, that since the time that this Response was made, they finally found Troutfelt and talked to him, but he has no independent recollection concerning this matter at all.

The Court: Well——

Mr. Clausen: Your Honor——

The Court: Even assuming that the matter was—you were unable to answer it, or felt you were unable to answer it at [16] the particular time, is there any way of stipulating to the facts here?

Mr. Clausen: I will stipulate that none of these officers informed Martin E. Troutfelt that—I will stipulate that none of these authorized officers informed Martin Troutfelt the Defendant bound and committed itself to issue a policy of insurance. Do you accept the stipulation?

Mr. Haas: By these "authorized officers," you refer to the President, the Vice President, the Secretary, or Assistant Secretary?

Mr. Clausen: That is correct.

Mr. Haas: That stipulation is perfectly satisfactory.

The Court: All right.

Mr. Haas: We can pass on the next matter. We have the same problem, your Honor, in Plaintiff's Request No. 10 which reads as follows:

"That after receipt by Defendant of said two applications, the only written communication or advice by Defendant to said Martin E. Troutfelt that the Defendant insured or agreed to insure him consisted of delivering to him of the original of said Exhibit A."

May we have the same stipulation on that, counsel?

Mr. Clausen: Stipulate to what, counsel?

Mr. Haas: May we have a stipulation then, counsel, that [17] after receipt by Defendant of said two applications, the only written indication or advice by Defendant—and when I say "by Defendant," I mean made by the President, the Vice President, the Secretary or Assistant Secretary—"to said Martin E. Troutfelt that the Defendant insured or agreed to insure him consisted of the delivery to him of the original of said Exhibit A."

That is the stipulation, Counsel.

The Court: To what time do you want this to go? I mean there was undoubtedly some communications when this matter was terminated, but that is prior to the death of Martin Troutfelt.

Mr. Haas: Oh, yes. We will come to that, your Honor.

The Court: Well, I mean your question is, it

was prior to his death, that was the only communication?

Mr. Haas: Yes, your Honor.

Mr. Clausen: Well, I won't stipulate to that, your Honor because we are going to offer in evidence the applications, the policies that were issued, and our response to it. There were various communications made by the company in sending back the policies, you see.

Mr. Haas: Well, let's limit it to a point in time, Counsel.

Mr. Clausen: And they don't know——

Mr. Haas: I am limiting it to this point of time: Between after receipt by the Defendant of said applications— [18] those are the applications dated May 31st, 1939, the other dated July 11th, 1939— after receipt of those applications and prior to the date when this policy was delivered, the only written communication or advice by defendant to Troutfelt that the Defendant insured or agreed to insure him consisted of delivery to him of the original of said Exhibit A. Do I make myself clear? I am just talking about the interval of time between the making of the applications and delivery of the policy.

Mr. Burns: The application you have reference to is the one that is dated May 11th, 1939, signed by Martin Troutfelt, and those total supplementary provisions for ten years and——

Mr. Haas: The only period of time I am asking now for in stipulation is the period between the receipt by the insurance company of these two

applications and the delivery to Martin Troutfelt of the policy.

Mr. Clausen: I can't stipulate to that because I don't know and the company doesn't know and says so.

Mr. Haas: I will offer in evidence——

Mr. Clausen: I don't see the materiality.

Mr. Haas: How the Defendant insurance company cannot know, your Honor, whether it made a written communication to this man between two dates just escapes me. They say Troutfelt wasn't there. But Troutfelt wasn't the insurance company. They know what letters they would have. They have got to know [19] what letters they wrote to this man.

The Court: Now what was the Request for Admission there that was—how was it answered then?

Mr. Haas: The Response to this, your Honor, is:

“Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny Request No. 10 for the reasons set forth in answer to Request No. 9, (which is Mr. Troutfelt left the service of the company on February 13th, 1946), except that in addition to the delivery to Martin E. Troutfelt of the original Exhibit A, Defendant issued its official receipt for premium for the term plan in the amount for which said Martin E. Troutfelt made application.”

The Court: Well, the answer to your question is that they sent no other communications.

Mr. Haas: That is what they say. I want to move to strike beginning with the language,

“except,” because it’s simply self serving. The question is whether the only written communication or advice by said Defendant to Martin E. Troutfelt that Defendant insured or agreed to insure him; and they say, “We can’t answer that except we sent him a receipt.” Well, a receipt isn’t a communication that they insured or agreed to insure him. It’s simply a receipt as stated in the Response. [20]

But I don’t see how they can say that they don’t know whether they sent him a written communication between two dates.

The Court: I don’t see either. If you limit to the official’s names, it seems to me you ought to be able to answer the question.

Mr. Clausen: Since this is just a continuation of the prior question which asks for oral communications, I will stipulate to the same thing I stipulated with respect to No. 9 that for No. 10.

Mr. Haas: Well, I would like you to state for me, Counsel, what you believe it to be.

Mr. Clausen: That is my previous stipulation.

The Court: Restate it.

Mr. Clausen: That after receipt by Defendant of the two applications, one dated May 31st, 1939 and the other dated July 11th, 1939, the only written communication or advice by the authorized officers indicated upon the face of the policy was the delivery of the original of Exhibit A, and I will add on what the company wanted except for the delivery to him of premium receipts.

The Court: Do you have any objection to that?

Mr. Haas: No objection to that.

The Court: All right. The stipulation is accepted.

Mr. Haas: The same problem is presented by No. 11, [21] Plaintiff's Request for Admission No. 11—I should say the answer to that request——

“That Defendant is without knowledge or information as to the facts upon which it can truthfully admit or deny Plaintiff's Request No. 11 for the reasons set forth in answer to Request No. 9; i/e, that Troutfelt——”

The Court: What are you questioning in 11?

Mr. Haas: I just wanted to give the answer so you could see the same problem exists, your Honor. 11 reads as follows:

“That after receipt by Defendant of said two applications, Defendant never advised Martin E. Troutfelt that premiums under the family income provision would not have to be paid by him for more than ten years from February 24th, 1939, if he lived so long, in order to entitled his beneficiary to receive family income payments under the supplementary provisions for family income; or that it was not necessary for him to pay such premiums for fifteen years from February 24th, 1939, if he lived so long.”

That is, we are asking whether an authorized officer of the company told or communicated to Martin Troutfelt that what he was supposed to do under the thing and what they were [22] supposed to do under it was something different than what was written on it.

Now here again the answer is, "They have no information or belief because George Troutfelt, the writing agent, left the service of the company."

But they have to know whether the President or somebody told Troutfelt that he didn't have to do what the policy stated.

The Court: You are talking about the insured, Troutfelt?

Mr. Haas: We are talking about the insured, Troutfelt. George Troutfelt is the writing agent.

The Court: I understand he must be some relative.

Mr. Haas: I think he is a brother of the insured.

The Court: All right.

Mr. Haas: The same stipulation, that none of the authorized officers after these applications were processed informed him that he had to pay for 15 years.

Mr. Clausen: That isn't what the Request asks, Counsel. The Request asks for an admission that after receipt by Defendant of the applications, the Defendant never advised Troutfelt that he would not have to pay for more than ten years, if he lived so long, in order to entitle his beneficiary to receive family income payments under the supplementary provisions or that it was not necessary for him to pay such premiums for fifteen years from February 24th, if he lived so [23] long.

The Court: He has agreed to the first part. He has already stipulated that they never told him that he would have to pay for 15 years.

Mr. Clausen: And besides, your Honor——

Mr. Haas: That isn't what I am asking for, your Honor.

Mr. Clausen: You see, the Request asks for a legal conclusion, anyhow.

Mr. Haas: Why?

Mr. Clausen: Well, that it was necessary for him to pay such premiums.

The Court: Well, the word "necessary"—you mean——

Mr. Clausen: Well, I will—what addition do you want, Counsel?

Mr. Haas: Suppose we go at it this way. Suppose—take Request for Admission No. 11 and have it understood between us that the word "Defendant" in here means the authorized officers of the Defendant listed on the face of the policy. I think that is our only point of difference, is that.

Mr. Clausen: All right, all right. I will agree to that.

Mr. Haas: With that stipulation, I offer No. 11 in evidence with the understanding that the word "Defendant" as used in the Request for Admission means the officers stated on the face of the policy, your Honor. [24]

The Court: The answer to that would be the Request in the question was so limited.

Mr. Clausen: Yes, your Honor.

The Court: All right.

Mr. Haas: All right.

(Whereupon the aforesaid Answer to Request for Admission No. 11 was received and admitted into Evidence as hereinabove.)

Mr. Haas: We will next offer in Evidence Defendant's Response No. 13 which reads as follows:

"Defendant admits that it never informed Martin E. Troutfelt that any portion of the original of said Exhibit A was a mistake or the result of a mistake."

We will offer that in evidence, your Honor.

The Court: It may be admitted.

(Whereupon the aforesaid Response No. 13 by Defendant was admitted into Evidence as hereinabove.)

Mr. Haas: Plaintiff's next offer in Evidence is Defendant's Response No. 14 which reads as follows:

"Defendant admits that not until May, 1954 did Defendant ever inform Plaintiff that any portion of the original Exhibit A was claimed to be a mistake or the result of a mistake." [25]

The Court: May what?

Mr. Haas: May, 1954, your Honor.

The Court: May, 1954.

Mr. Haas: May that be admitted in Evidence, your Honor?

The Court: It will be.

(Whereupon the aforesaid Response No. 14 by Defendant was admitted into Evidence as hereinabove stated.)

Mr. Haas: Plaintiff's Request for Admission No. 17 reads as follows:

"Defendant never informed Martin E. Troutfelt that the amount of premium to be paid for the supplementary provision for family income at-

tached to a 15 year endowment policy where the premium was payable for 15 years or until insured's death, if earlier, and the family income was payable until the termination of twenty years from the policy issuance date was different than if the income was payable for a period expiring 15 years from the policy issuance date and the premium was payable for ten years, or until insured's death, if earlier."

The Defendant's Response to that, which is in Paragraph 17 of their responses, is:

"Defendant admits Plaintiff's Request No. 17 because——" [26]

——and then some reason is given. We will ask that Plaintiff's Response No. 17—Plaintiff's Request No. 17 be offered in Evidence as admitted; that Defendant's Response No. 17 be admitted in Evidence—so far as it reads, Defendant admits Plaintiff's Request No. 17—and that all the words after the figure 17, beginning with the word "because" be stricken as non-responsive.

The Court: As far as I can see, the Answer is what counts. If you want to offer the reason for it and it's admissible, you can do it by appropriate testimony. Then the question of whether or not it is germane or material can be gone into and your offer will be accepted and that portion of the entry which you have read will be admitted.

The Clerk: Is that 17?

Mr. Haas: That is 17, that's right.

(Whereupon the aforesaid Response No. 17

by Defendant was admitted into Evidence as hereinabove stated.)

Mr. Haas: Plaintiff's Request No. 18 reads as follows:

"That Defendant never informed Martin E. Troutfelt that it did not or would not issue a supplementary provision for family income which would exceed the term of the policy to which it was attached."

To this request Defendant makes the same answer as it has made heretofore; that they can't answer that because George [27] Troutfelt is no longer with the company.

Counsel, may we have the same stipulation with respect to 18?

Mr. Clausen: Yes, you may.

Mr. Haas: Very well. I understand that it is stipulated that the Defendant—and by Defendant we mean the officers listed on the face of the policy—never informed Martin E. Troutfelt it did not or would not issue a supplementary provision for family income which would exceed the term of the policy to which it was attached; correct, Counsel?

Mr. Clausen: Yes.

Mr. Haas: I should like to offer in Evidence an admission of the Defendant contained in its answer to Interrogatories propounded by Plaintiff.

On Page 1 beginning on the next—the line next to the bottom which reads as follows:

"The Company never considered Policy No. 3223099 with the supplementary provisions for family income attached thereto to be representative of

the contract of insurance entered into between the company and the insured."

May that be admitted, your Honor?

The Court: What is your position on that?

Mr. Haas: This, I should say, your Honor, is in response to one of our interrogatories: [28]

"On what do you rely for your claim of mistake, a mutual mistake,"

and that is part of their answer thereto.

Mr. Clausen: Well, what about the rest of the answer?

Mr. Haas: I don't want to put in the rest of the answer, Counsel.

Mr. Clausen: I don't quite see, Counsel, where that is an admission.

Mr. Haas: If you are coming in 15 years after you write a policy and saying that there is a mistake and you admit that you never considered that the policy was the contract, I am going to ask you how can you show diligence in seeking to reform a contract when the period of limitations is three years after discovery. That's our position in the matter, your Honor. That is why I think that this statement is admissible.

The Court: Well, there is no question but what it is admissible. The question is should this be admitted at the same time. That is the only question.

Mr. Haas: Well, I should think, may it please the Court, that Counsel can put in anything he wants to. I don't have to read in the answers they

give us to our interrogatories, which is just a lot of—which is their case.

The Court: The only problem I see in it is whether or not the admission is a separable one. In other words, if it [29] is modified by other provisions, the modifications should go with it.

Mr. Haas: If he feels that it is in some way modified, I have no objection to having Counsel explaining his position or showing in what way it is modified by the way part of the answer——

Mr. Clausen: It is, in effect, a conclusion of the other factors relied upon by the company. And when it says, “The company never considered Policy——” and so forth——“to be the contract,” it is stating the company’s position on its intentions and is not an admission that they never looked at this particular piece of paper.

It’s a conclusion of what the company intended when it issued its contract of insurance. All these other previous answers that you see go to this final conclusion.

The Court: Well, it is still a statement by the company. I don’t know, as far as I am concerned, it can go into Evidence as read unless, I say, there is some further modification. If you have any—that is, if there is further statement there that should be added to it, you can go over that also.

Mr. Haas: Now that we have some of this material in evidence I should say that I think that’s about our case, your Honor. Perhaps I can have a couple of minutes to talk about it?

The Court: Certainly. [30]

Mr. Haas: We have got a written policy of life insurance here, which is perfectly plain on its face. The Defendant takes the position that there is a mistake. As I say, we deny that.

We also have set up certain defenses. The first of which is the Statute of Limitations.

As your Honor is aware, the period in California, which is the law to be applied here, is three years from discovery of the facts. Now, we have an insurance policy——

The Court: Now, wait a minute. Has the Statute of Limitations been pleaded here?

Mr. Haas: Yes, your Honor. May I call your attention specifically to where it is pleaded?

The Court: Yes.

Mr. Haas: We pleaded it——

The Court: In the answer to the counter claim?

Mr. Haas: Yes, your Honor.

The Court: I see.

Mr. Haas: And in our answer——apparently they have set up not only by counter claim but by way of defense—and the California cases are perfectly clear—that when the plaintiff sues the defendant on a contract and the defendant sets up mistake, however he may plead it, that is by way of defense or by way of counter claim, the plaintiff is entitled to set up limitations. That is, he is entitled to state that the defendant [31] who wants to change the contract has not acted within a period.

The Court: That technically is a plea of the statute of limitations.

Mr. Haas: Well——

The Court: I mean whether it's technically that or thought you may have to testify, of course. I mean, you may be able to respond to the defense. But I don't think—do you have to affirmatively plead in the statute to claim that?

Mr. Haas: I don't know, your Honor, but we did.

The Court: You did, you did. I assume that all the allegations in the Answer are deemed denied except those irrelevant affirmative defense?

Mr. Haas: Yes, your Honor. But this is a counter claim in here to which we had to file a reply.

The Court: I understand that. You pleaded that.

Mr. Haas: The first authority, 5, 6 and 7, and 8 defenses go to the Statute of Limitations; that is, those defenses to the reply of the counter claim.

The Court: And your position is that the burden was upon the defendant to correct the mistake within three years, otherwise the Statute is run on there.

Mr. Haas: That is correct, your Honor. Our position is that one who wants to reform on the grounds of mistake has to plead and prove that with the exercise of reasonable diligence he couldn't have discovered his mistake any sooner than he did. [32]

Your Honor is familiar, of course, with the principle that knowledge and discovery are not convertible terms. If you are more than three years after the Statute, you have to go forward and say, "This

is what I did. This is why I didn't discover it. There is a mistake. And even though I am late, I simply couldn't discover this thing until now."

The Court: Now, may I ask you, do you have to prove that on your case?

Mr. Haas: I don't think so, your Honor. I think that when the pleading——

The Court: In other words, you have made your prima facie case?

Mr. Haas: I have made a prima facie case.

The Court: By introducing the policy.

Mr. Haas: They now come in and say, "We didn't discover this until 1954."

The Court: Well then, wouldn't it be well to state that? Aren't you anticipating as a matter of trial—in other words, you don't have to go any further. You can rest at the moment.

Mr. Haas: I can rest at the moment. I just wanted to let your Honor know what our whole case is about here.

The Court: Yes, for information.

Mr. Haas: Just so that your Honor knows what our position is in the matter before I sit down. [33]

The Court: Yes.

Mr. Haas: They have come in and they say, "We discover this 15 years after the policy was written by us. We discover it nine years after the policy is submitted to us for payment, and after our Secretary stamps on the policy," pay in accordance with the very provision that they now claim to be a mistake and it's our position that it is simply an insu-

perable burden. That as a matter of law they discovered when the policy was presented for payment and signed by their officer, they discovered the mistake, if any time, as a matter of law.

The Court: They did or should have.

Mr. Haas: According to the pleadings they deny that they read the policy at the time that it was submitted. But I don't see how that gets them anywhere when you are an insurance company and in the business of paying claims when they are presented and the policy is submitted to you, you can't get anywhere by saying "I didn't read the policy yet."

The Court: All right. I see your point.

Mr. Haas: We also, your Honor, urge the incontestability clause of the policy. There is a case in this Circuit, in the Ninth Circuit, the Richardson case, which just holds that when an insurance company—that an insurance company cannot seek to reform a policy for mistake when the policy contains an incontestable clause. This is specifically pleaded in the reply to the counter claim. [34]

The Court: All right.

Mr. Haas: Now, there is just one other thing I would like to say before I quit. That is this: The policy on this little flyleaf reads as follows: "It is not necessary to employ any firm or person to collect the proceeds of this policy."

"It is not necessary to employ any firm or person to collect the proceeds of this policy."

It's our position, your Honor, that that is a warranty and representation and if the Court should

conclude the plaintiff is entitled to judgment here, that the Court should award a reasonable attorney's fee as the amount of damages, which the parties could proximately expect flow from a breach of that statement and warranty.

I just can't imagine what this is on the policy or what it's intended to be if it isn't that when you have a just claim that you will pay it and that you don't have to hire anybody to get your money.

And on that contractual basis, we will ask that if the Court render judgment for the Plaintiff, that the Court also award a reasonable attorney's fee.

The Court: All right. Mr. Clausen.

Mr. Clausen: I will make a short opening statement, lest you think that the Defendant is completely ignorant of the law and is coming into court with a case—no case as a [35] matter of law. I thought we had better clear away these legal issues first.

The application for the policy, premiums payable, delivery of the policy, all took place in New Mexico. Of course, your Honor will be required to apply New Mexico law.

Mr. Haas: Pardon me, Counsel. I don't mean to interrupt, but I do not agree or stipulate that the policy was delivered in New Mexico. I don't know where it was delivered.

Mr. Clausen: Well, that is part of our proof, your Honor. And this Richardson case that he made mention of is a lone case that stands against the majority rule practically universal throughout the United States, that a defensive mistake, as we raise

here, is not a contest within the meaning of the incontestable clause.

And, of course, we contend that under New Mexico law, will contend that the defensive mistake in a scrivener's error is not a contest within the meaning of the incontestable clause.

Besides which we contend that under California law the Richardson case—the rule of the Richardson case does not apply.

The second objection that the Plaintiff has raised is with respect to the Statute of Limitations. Now the law in California is the very opposite of what Counsel stated. The Defendant was bound in duty to reform this document. That it could [36] abide its time until sued upon it, you see, excuses it from performance as stated on one part of the contract. The Statute of Limitations does not apply to the defense of mistakes and fraud.

Now, out of extra caution, we also counter claim for reformation. And I anticipate that this case will be briefed and I have a case on this, holding that the Statute of Limitations does not apply in this type of a situation.

Now——

The Court: Well, your position is—I don't know what the answer to the question is—but is it your position that as a matter of defense as distinguished from a counter claim?

Mr. Clausen: That is correct, your Honor.

The Court: It doesn't apply. But in a counter claim you may be facing the statute, I don't know whether that is a situation—in other words, if the

action is one in reformation, that is distinct; but if the action is one and just whether you are liable on the policy, that is another thing.

Mr. Clausen: Now the important thing in this case is that this big piece of paper that counsel has been showing you is only a part of the contract. The application of the insured is the other part of the contract, both under the law and under the stipulations in the contract itself.

And we contend that when the policy was delivered to the insured, it stated right out there in the face of this document [37] that there was a mistake. And because of the sequence of events that developed through our witness here, it's a very understandable mistake because he applied for a converted policy within a few months of the original policy. The original policy was for a twenty payment life plan and the policy he secured was an endowment policy, and the defendant would never issue this type of a family income rider on this endowment policy. It stands right on the face of the instrument.

All the company—you can see he admitted all the facts. There is practically no dispute in the fact that all they want to do is perform under the contract. You see, we have to distinguish between the evidence of the contract, this policy, and the application.

Your Honor will be called upon to order enforcement of the contract, the agreement entered into by the parties. All that the company wants to do is pay what Martin Troutfelt bought. He bought the pol-

icy. He asked for a 15 year family income rider. He paid premiums for that. He didn't pay premiums for a 20 year plan. And that is all the company wants.

We will develop through our witness here the sequence of events and the fact that the company would never issue this kind of a rider with that kind of a policy. The fact that he applied for it, signed these documents, and the fact that you see the company does not keep a copy of the policy in its home [38] office, all that it has is this thing, these forms, application forms, in which they take their records, their accounting records. So that it makes no—the defendant in never admitting the insurance company informed him that he would have had to pay for an extra five years is telling the truth because at the time we say the 11 year came around he bought a plan where he had to pay premiums for ten years and got 15 years family income covering it.

If he had paid, say, in the 11th year the premium would have gone back to the home office. The records would have shown that he paid up fully because they don't have a copy of the policy.

The Court: Without in any way attempting to indicate a decision on the matter, what about the subsequent action of the company, the endorsement on the policy at the time that he started payments under the monthly plan?

Mr. Clausen: We admit that fact. They just didn't catch the error.

The Court: You admit it, but what about the binding effect of that action?

Mr. Clausen: That is a matter to be briefed. As you can see, the stamp, with a consideration, was their authority.

The Court: Except the premiums that he paid.

Mr. Clausen: Yes. And he had paid premiums, you can see, for only the 15 year coverage. [39]

The Court: Well, I mean—I see the point that you are making—but what I want to—I just for the purposes of information asked the question. I don't know what the legal effect of that is.

Mr. Clausen: Yes, your Honor.

The Court: But I presume Plaintiff takes the position that that is a binding agreement on the parties that if there was any error it was ratified and it was confirmed by the subsequent action.

Mr. Clausen: Well, that is a matter for the Plaintiff to prove, your Honor, ratification and knowledge.

The Court: Well, I mean he has proved that it was done. I think that the effect of that is something that—in other words, the inference that flows from that——

Mr. Clausen: There are conflicting inferences, your Honor.

The Court: Well, in any event, you are correct in that the matter has to be briefed because it is a question of law to be determined from already admitted facts.

Mr. Clausen: Yes.

The Court: Is there any fact upon which there is any conflict here, any basic fact so far?

Mr. Haas: Not that I know of, your Honor.

The Court: Well, if you have evidence that you want to offer insofar as to go to show the underlying mistake—— [40]

Mr. Clausen: That is right.

The Court: And there may be some dispute as to that. But that is a matter which you will offer into evidence.

Mr. Clausen: All right.

The Court: You may proceed, Mr. Clausen.

Mr. Clausen: Call Mr. Dennis Lawton.

The Court: I think we will just run right on through. About how long would you be?

Mr. Clausen: I should be finished shortly.

DENNIS J. LAWTON

a witness called by the Defendant, sworn.

The Clerk: State your full name for the Court's record.

The Witness: Dennis J. Lawton.

Direct Examination

Q. (By Mr. Clausen): Mr. Lawton, where do you reside?

A. 194 Appleton Avenue, San Francisco.

Q. And by whom are you employed?

A. John Hancock Mutual Life Insurance Company.

Mr. Haas: May it please the Court, we will object to any further questions being asked of this

(Testimony of Dennis J. Lawton.)

witness on the ground that prior to the trial of this case we submitted to the Defendant certain interrogatories, the first of which was upon what facts, events, and circumstances, did they rely [41] as tending to show that a mutual mistake of the Defendant and insured and by accident this policy was not the contract to the parties.

And then we asked that the Defendant rely upon the testimony of any person as showing or tending to show any of said facts, events or circumstances. The answer was yes.

Four: If the answer to interrogatory 3 is yes, give the name, address and occupation of any such person and summarize the expected testimony.

And in response to that interrogatory the Defendant answered, "Alfred Keef, Regional Supervisor, John Hancock Mutual Life Insurance Company, Franklin G. Bone, Section Head, John Hancock Mutual Life Insurance Company."

And then their expected testimony as summarized. Nowhere in the answers to these interrogatories did the Defendant advise us that this gentleman would be called as a witness or advise us of what his expected testimony would be. And to permit him now to testify is simply to subvert the discovery practice.

The Court: What is the situation there, Mr. Clausen?

Mr. Clausen: Your Honor, we have made arrangements for, or had expected the testimony of Mr. Alfred Keef. He was this gentleman's super-

(Testimony of Dennis J. Lawton.)

visor at the time of the application of processing. He was supposed to contact me. So a week ago I wired the company to find out where he was. They wired me [42] back that he had been transferred to Miami unknown to the Law Department.

Now I am sure that there will be no prejudice insofar as discovery is concerned. They have our entire file.

The Court: The summary of the testimony is going to be the same, in other words, Mr. Lawton——

Mr. Clausen: He is going to, of course, identify these instruments.

The Court: Well, the point is that the summary—is there going to be any deviation from the summary of the testimony that Mr. Keef would have given?

Mr. Clausen: I don't believe so, your Honor. You see, the answer to the interrogatory was very general, that it was a general summary.

Mr. Haas: Your Honor, if this witness is going to give the same testimony that this other gentleman would have given, I have no objection to his testimony, his testifying. I don't much care for the name of the witness. I do care to know when we ask what testimony there is going to be——

Mr. Clausen: I informed counsel as soon as I got to counsel——

The Court: That may be true. But even so, make the record clear. He says he has no objection if this man is going to take the place of Mr. Keef in giv-

(Testimony of Dennis J. Lawton.)

ing the testimony that is to be given in this case. Is that correct? [43]

Mr. Clausen: He has taken his place. I believe that he will shed further light not damaging to the—I mean further light on the processing of this claim because he happened to be the actual person who handled these applications unbeknownst to myself.

The Court: All right. We will overrule the objection. I will permit the witness to testify. He said he was employed by the John Hancock Mutual Life Insurance Company. He didn't say in what capacity.

Q. (By Mr. Clausen): In what capacity are you employed with the company?

A. Office Supervisor.

Q. And what duties does that entail?

A. General clerical clerk.

Mr. Haas: I didn't hear the witness' first answer.

The Court: Office Supervisor.

Q. (By the Court): When you say Office Supervisor, you mean here in San Francisco?

A. (By the Witness): Yes, your Honor. Yes, your Honor.

Q. (By the Court): For what region does that cover?

A. (By the Witness): For the Mission Office right here.

Q. (By the Court): What?

(Testimony of Dennis J. Lawton.)

A. (By the Witness): The Mission Office. It's at 4667 Mission.

Q. (By the Court): Yes, but what territory?

A. (By the Witness): Just half the City of San Francisco, your Honor.

The Court: Oh, I see.

Q. (By Mr. Clausen): And how long have you been with the company, Mr. Lawton?

A. Over 25 years.

Q. And calling your attention to the early part of the year 1939, you were then employed by the company? A. Yes, sir, I was.

Q. In what capacity, Mr. Lawton?

A. District cashier.

Q. And what duties did that entail?

A. They are exactly the same as the ones I perform today, except they changed the title.

Q. Would you elaborate?

A. The office clerical work supervising the processing of applications and receipts of money and correspondence with the home office, field force, and policy orders.

Q. Did you have occasion in the early part of the year 1939 to process the application of one Martin E. Troutfelt for insurance?

A. Well, it was processed in the office I was then employed at.

Q. Your office? A. Yes. [45]

Mr. Clausen: Now, your Honor, I have here this file, and these papers are pasted together. I

(Testimony of Dennis J. Lawton.)

can either offer them as one Exhibit and have him identify each document, or tear them apart, or whatever your Honor wishes.

The Court: I don't particularly care to have them torn apart, unless Mr. Haas does.

Mr. Clausen: Do you have any objection?

Mr. Haas: I haven't seen them yet.

The Court: All right. Then examine them.

Mr. Haas: May I have a moment, your Honor?

The Court: Yes, you may.

(Mr. Haas then examined the papers.)

Q. (By Mr. Clausen): Now, I will show you a document entitled "Application to the John Hancock Mutual Life Insurance Company at Boston, Massachusetts," and ask you to examine it, and ask you to identify that document.

Mr. Clausen: This is a book, you see, your Honor, to which all the other papers are attached.

Mr. Haas: What application is that, Counsel? Application for what—well, I think the document speaks for itself.

A. (By the Witness): This is a medical examination or application.

Q. (By Mr. Clausen): And for what number policy? A. 3171136.

The Court: Is that the original policy? [46]

Mr. Clausen: Yes, your Honor.

Q. I will show you the document attached to the previous document entitled, "Part A of Application," and ask you to identify it.

(Testimony of Dennis J. Lawton.)

A. This is the application for policy 3171136 by the applicant, the proposed insured.

Q. And what type of policy did the insured ask for?

Mr. Haas: I will object to that question on the ground that the application speaks for itself.

Mr. Clausen: The witness is going to explain these terms to your Honor.

The Court: I will overrule the objection on that point. The document does speak for itself, but it does require an interpretation.

A. (By the Witness): A twenty year payment life policy.

Q. (By Mr. Clausen): And what is a twenty year payment life policy?

A. It's a life policy with premium payments becoming due through a period of twenty years. In other words, at the end of twenty years, the insured would not have to pay further premiums, and he would be insured for the remainder of his life.

Q. And when does it become payable?

A. The proceeds of the policy?

Q. Yes. [47]

Mr. Haas: I will object to this whole line of questioning, your Honor. If there is a contract here, let your Honor decide what a twenty year policy is and when its payments—these are all questions of law. If he has got a policy, let him put it in. Your Honor knows what the insurance policy says and what it means.

The Court: I presume it speaks for itself. What

(Testimony of Dennis J. Lawton.)

do you want to do with this witness in this respect?

Mr. Clausen: Your Honor, you see the point that the company has made is that it would be inconceivable that they would ever have a family income rider on an endowment policy of the terms that were put in this particular policy. I am just going to contrast, you see, the different kinds of contracts that this person actually planned for.

The Court: Well, Mr. Haas said that you should produce the contracts and that they'd speak for themselves. You can argue that. You don't have to prove it by this witness. Do you want to put that file in? I presume that is a file of this man, Troutfelt?

Mr. Clausen: Yes, your Honor.

The Court: That you have there, an office file.

Mr. Clausen: Well, I will offer the entire file and if Counsel has no objection——

Mr. Haas: I object to it on the ground that there has been no foundation laid. [48]

Mr. Clausen: I am trying to lay the foundation, your Honor.

The Court: Well, in what way has the foundation been laid?

Mr. Haas: We have a mass of documents here. The witness hasn't testified that Troutfelt signed any of these papers, or that any doctor signed any of these papers. As far as I know, he is just telling us that that is an application for policy number 3171136.

Q. (By the Court): Well, Mr. Lawton, that is

(Testimony of Dennis J. Lawton.)

a file that is kept by the John Hancock Mutual Life Insurance Company in the office of which you are now the supervisor, and in which you worked in 1939, which is kept in the regular course of business?

A. (By the Witness): No, your Honor. This is a file that would be maintained at our home office at Boston, Massachusetts.

Q. (By the Court): Well, it is a file though, a regular file that is maintained in the regular course of business, is that correct?

A. (By the Witness): Yes, sir. It's the source documents for the policies, that is, the original applications.

Q. (By the Court): And did those documents clear through this office before they went to the home office?

A. (By the Witness): Yes, your Honor. [49]

Q. (By the Court): And that is the office at which you work?

A. (By the Witness): Yes, at that time. It was at 681 Market Street.

The Court: All right.

Mr. Clausen: I now offer the file in evidence.

Mr. Haas: I still object on the ground that there has been no foundation laid.

The Court: Well, it is a business record of the company. I am not going to be over technical about it. I will admit it into evidence as Defendant's Exhibit A.

The whole file?

(Testimony of Dennis J. Lawton.)

Mr. Clausen: Yes. I am going to include now the——

The Court: You had better make that a special exhibit now, what you are doing there, if you are going to add additional papers if you want to. I mean, all you need to do is identify it.

Mr. Clausen: These were the original applications.

The Court: Are they part of that file?

Mr. Clausen: They are the originals of Plaintiff's 1, you see.

The Court: I understand that.

Mr. Clausen: And they were part of that file.

The Court: If they are part of that file, they should be annexed to the bottom in the place that they belong. Attach them to it then in their appropriate place or any other place. [50]

Q. (By the Court): So that there will be no misunderstanding about it, those originals are the applications, are a part of the same file, are they, Mr. Lawton?

A. (By the Witness): The last two documents, your Honor, yes.

The Court: Well, I didn't see them. Show them to the witness, will you please?

Q. (By Mr. Clausen): These two documents attached here, Application for Supplementary Rider, dated May 7th—July 11th, 1939, are part of that file, is that not correct? A. Yes.

The Court: All right then. The documents with

(Testimony of Dennis J. Lawton.)

all of the papers will be admitted as Defendant's Exhibit A.

(Whereupon the foregoing office file and attached documents were admitted into evidence as Defendant's Exhibit A.)

Q. (By Mr. Clausen): Now, was a policy of twenty payment life insurance issued by the Defendant to Martin Troutfelt after the application was transferred to your office? A. Yes, sir.

Q. And did it have attached to it a family income rider?

A. Yes, sir. It provided for a family supplementary provision.

Q. And what term was that, Mr. Lawton? [51]

A. The period of the rider, it was twenty years with premiums payable for fifteen.

Q. And what was the premium charged for the family income rider?

Q. (By the Court): Do you need the papers?

A. (By the Witness): I can't recall. It would be around, over twelve—it would be around \$12.00 per thousand.

Q. (By Mr. Clausen): \$12.00 a thousand, you don't know exactly?

A. No, I don't know exactly.

Q. I will now show you a book entitled, "Premium Rates," dated July, 1938, and ask you to describe that to his Honor, what is it?

A. It's a rate book used by our salesmen. It furnishes the plans and premiums for the policy to be issued.

(Testimony of Dennis J. Lawton.)

Q. And that is issued by the Defendant, isn't it?

A. Yes.

Q. For the advice of the agents in computing premiums?

A. Right.

Q. Now can you look in that book and tell me whether policy number—can you look in that book and tell me what the premium charged for the family rider of policy number 3—the original policy 3171136 was?

A. What is the age on that, sir?

Q. Thirty-six. [52]

A. For the original policy?

Q. Yes.

A. It would be \$10.59 per thousand, five times.

Q. Make a monthly total of what? \$52.95?

A. \$52.95.

Q. And was that payable yearly?

A. That would be an annual premium, yes.

Q. Now since you have——

Q. (By the Court): That is a \$5000.00 policy?

A. (By the Witness): Yes, sir.

Q. (By Mr. Clausen): Well, you have your rate book in front of you. What is the premium chargeable for a 15 year family income provision with a 10 year premium?

Mr. Haas: Attached to what kind of policy, Counsel?

Mr. Clausen: What?

Mr. Haas: Attached to what kind of policy?

A. (By the Witness): It wouldn't matter. It's

(Testimony of Dennis J. Lawton.)

a supplementary provision. It would be the same on any type of policy, premium.

Q. (By Mr. Clausen): What would be the premium chargeable?

A. It would be \$8.64 per thousand.

Q. And what would that be for \$5000.00?

A. \$43.20, if my application is correct.

Mr. Clausen: I am going to offer this rate book in evidence, your Honor. [53]

The Court: Do you need the rate book with the testimony?

Mr. Clausen: Well, all right. I will withdraw the offer.

The Court: Unless Mr. Haas wants it in for his own recollection. I don't need it. As a matter of fact, I doubt my ability to read the rate book accurately. I would have to rely on this man's testimony, who is an expert in his field.

Q. (By Mr. Clausen): Now you say that a policy number 3171136 was issued and delivered to the insured, Mr. Martin E. Troutfelt?

A. Yes, sir.

Q. Now did it have on the face of the policy these premiums charged for the family income rider?

A. Yes, it would have it on the file in back.

Q. On the front of the policy, is that not correct? A. Correct.

The Court: He called it the file in back.

The Witness: Well, your Honor, we fold it up

(Testimony of Dennis J. Lawton.)

and put it into a glassene envelope so that the policy—you can see the premiums.

The Court: Yes, in the window it shows the amount of premiums to be paid.

The Witness: Yes, sir.

The Court: And you have shown them all in the original policy, that is, Plaintiff's Exhibit 1, that is right there, isn't it? [54]

Mr. Clausen: Yes, your Honor.

The Court: It's in evidence already.

Mr. Clausen: Well, that——

The Court: Isn't that the policy there? Don't we have the original policy?

Mr. Burns: No, your Honor. That is the subsequent policy. The original policy has not been offered.

The Court: Oh, I see. That is the substituted or exchanged policy. But it has the file in back on it, does it?

Mr. Clausen: Yes, your Honor.

The Court: And that shows the premium on it?

Mr. Clausen: Yes, your Honor.

Q. Now, subsequent to the issuance and delivery of policy number 3171136, did Martin E. Troutfelt make application for conversion of that policy?

A. Yes. He decided to change the plan.

Q. And was that application sent to your office from Albuquerque, New Mexico?

A. The request was received at our office.

Q. And then what did you do, Mr. Lawton?

(Testimony of Dennis J. Lawton.)

A. Well, our office force prepared a conversion form. It's a 128R.

Q. Do we have such a form in this Defendant's A?

A. Yes. There must be one there, sir. [55]

Q. All right. And then what did you do, Mr. Lawton?

A. We forwarded it to the insured for completion.

Q. And was that done in this case?

A. Yes, sir. There was a converted policy.

Q. Pardon?

A. Yes, yes, sir. There was a new policy issued on the original application.

Q. Yes, I know but——

The Court: Well, will you let him look at the file and point out the document?

Mr. Clausen: Yes. I am trying to find it myself.

The Witness: Here is the application for exchange.

Q. (By Mr. Clausen): All right. Did the insured ask that the family income rider be changed?

Mr. Haas: Are you talking about orally now, counsel, or in writing, or by this application?

Q. (By Mr. Clausen): Was that application asked for, or for a change in the rider?

Mr. Haas: I object on the grounds that the application speaks for itself. What it means, what it says, is a question of law.

The Court: Well, the application speaks for itself. Now if you want some phase of it interpreted

(Testimony of Dennis J. Lawton.)

by reason of special language because of this man's knowledge, you can. But you don't have to prove it by this witness because it's on the document [56] itself.

Mr. Clausen: Yes, your Honor.

The Court: Unless it's preliminary to some—if it is preliminary, I will permit him to go into it as a basis for whatever sections you desire.

Q. (By Mr. Clausen): Will you answer the question?

A. Yes. An application for conversion with a family supplementary provision was requested by him.

Q. And what did you do with that application, Mr. Lawton?

A. This application on its completion together with the additional forms were submitted with the policy to our home office.

Q. With the old policy?

A. The old policy, yes.

Q. And then did the home office communicate with you thereafter? After receipt of those documents?

A. Yes, they did. We have memorandums on their forms.

Q. The memoranda on that file, which you pointed out to counsel and to the judge.

Q. (By the Court): What does the memorandum say?

A. (By the Witness): Letter date of "Letter to and from."

(Testimony of Dennis J. Lawton.)

“To,” means to the District and “From” is to the home office sundry district. That is pencil memorandum 62339 thereon to the District which was the San Francisco one, was the title of the district, Re: family income provisions. [57]

Q. (By Mr. Clausen): Yes. Now did the company in response issue and deliver to you the policy sued upon in this case after receipt of that application?

A. No, they didn't. There was some further correspondence and additional forms required.

Q. And do you remember what the reason was for requiring additional forms?

A. Well, the original application for conversion did not specify a family income provision desired. It said, “15 year endowment, F. I. provision” leaving the coverage open.

Q. (By the Court): What do you mean by that? I don't quite follow you on that.

A. (By the Witness): The supplementary provisions, family income provision, is issued for a stated period of time, your Honor.

Q. (By the Court): Yes. Now what do you say that the correspondence was about?

A. (By the Witness): And the correspondence—when family—is the term of the policy, say, 15 years, but not the term of the family income provisions.

Q. (By the Court): You mean was that mailed back to the district office to determine that fact?

A. (By the Witness): That had to be deter-

(Testimony of Dennis J. Lawton.)

mined before they could convert the policy, your Honor.

Q. (By the Court): All right. Then what happened? [58]

Q. (By Mr. Clausen): Then what happened, Mr. Lawton?

A. Well, the form was prepared to cover that phase of it.

Q. (By the Court): You say "was prepared," where was it prepared? And who prepared it, if you know?

A. (By the Witness): Well, it would have been prepared at the home office or the district office on direction of the home office with the data furnished by the home office.

Q. (By the Court): The insured or the applicant had nothing to do with it other than by whatever information was on the application that you had on file?

A. (By the Witness): It would be transmitted to him for his approval and signature, sir.

Q. (By the Court): Well, was it in this case?

A. (By the Witness): Yes; his signature is on here.

Mr. Haas: What document are you talking about?

Mr. Clausen: We are now talking about the application for the family income rider attached to policy 3223099.

Mr. Haas: Is that it?

Mr. Clausen: That is it.

(Testimony of Dennis J. Lawton.)

Q. (By the Court): Are you saying it was made out in the home office or the district office and forwarded to the applicant there?

A. (By the Witness): For completion and signature, acceptance. The form gives the applicant's name, Martin E. Troutfelt, and typed in. And it states a request on it for the premiums to [59] be paid for ten years, amount of premium \$44.30.

Q. (By Mr. Clausen): Now were the blanks filled in on that application before—before the application was sent to the insured for his signature?

A. Well, the typewriting, the name and the questions 11 to 14, were inserted before it was forwarded to the applicant for completion.

Q. (By the Court): The questions 11 and 14, you say?

A. (By the Witness): Yes, sir.

Q. (By the Court): What are the questions 11 and 14?

A. (By the Witness): Well, question 11, sir, is term of supplementary provision.

Q. (By the Court): Now, that was filled in by the company before it went to him?

A. (By the Witness): Yes, sir.

Q. (By the Court): And then what is 14?

A. (By the Witness): 14 is premiums to be paid for number of years.

Q. (By the Court): And that was filled in by the company at 15 years?

A. (By the Witness): Ten years.

The Court: Ten years.

(Testimony of Dennis J. Lawton.)

The Witness: And the amount of annual premium.

Q. (By the Court): And the amount, the forty four dollars and some odd cents, whatever it is there, filled in also; and [60] that went to him in that form, is that correct?

A. (By the Witness): Yes, your Honor.

The Court: All right.

Q. (By Mr. Clausen): And then the subsequent—that is, subsequently did you receive that application by return mail from the insured?

A. Yes. It was subsequently received in our office.

Q. And then what did you do with it?

A. Well, I would normally refer it to the home office under cover of a letter and reply to their original request for this form.

Q. And subsequently then the company issued the policy sued upon in this case?

A. Correct.

Q. Now where was the policy delivered?

A. Well, on this specific instance to clear we have—I presume he lived in New Mexico—it would be mailed to him because it was an office transaction. In that it was a new policy, it would be given to the writing agent for delivery.

Q. And from where were the premiums paid?

A. From Albuquerque, New Mexico.

Q. (By the Court): Does this San Francisco office receive and process applications that came from New Mexico, applications of this kind?

(Testimony of Dennis J. Lawton.)

A. (By the Witness): No. That was a very rare [61] occurrence, sir. You see, this man was in San Francisco when he made his original application, although his residence was in New Mexico.

Q. (By Mr. Clausen): Who was the agent in this case, Mr. Lawton?

A. George Troutfelt.

Q. And was he a relation to the insured?

Mr. Haas: I object on the grounds that it is irrelevant.

The Court: Well, I will overrule it. I don't know whether it's relevant.

A. (By the Witness): I believe he was.

Q. (By Mr. Clausen): And does your company have an office in Albuquerque?

A. No, I don't think so.

Q. And is it not correct that any application made from Albuquerque would go through the San Francisco office?

A. Well, any changes or requests for modifications of policies after they are issued, they are handled regardless whether they are in Europe or Asia because of state of residence.

Q. Now, it's the company's position that the company would never have issued a twenty year family income rider on a 15 year endowment policy. Would you please explain to his Honor why the company would not do so?

Mr. Haas: I will object to that question on the ground first that we haven't established that to be a fact, and second, [62] this witness hasn't been

(Testimony of Dennis J. Lawton.)

qualified to testify as to what the company would do. He is a district officer out here. He isn't, as I understand it, the man to decide where the risks will be taken. I don't know whether just at the moment, know whether the question even as it stands would be permissible to a man of higher authority than this.

Mr. Clausen: I will withdraw the question.

Q. Have you processed claims? I mean, have you processed modifications of policies and the issuance of policies which contain family income riders? A. Yes.

Q. And about how many have you processed?

A. Oh, several hundred, I suppose.

Q. And over how long a period of time?

A. Let's see, since approximately—since 1935; almost twenty years.

Q. Now, has the Defendant ever issued a 20 year family income rider on a 15 year endowment policy?

Mr. Haas: I object to the question on the grounds that it's perfectly obvious that the witness couldn't know the answer. He is in San Francisco. He has handled several hundred policies. I suppose, just as the Court knows, that John Hancock has several million policies. How can this man testify as to whether John Hancock has ever issued a policy of a certain kind? [63]

Mr. Clausen: It goes to the weight, your Honor.

The Court: Yes, I will overrule it.

Mr. Haas: The fact is that they have issued

(Testimony of Dennis J. Lawton.)

such a policy and there is one admitted in evidence.

The Court: Insofar as he knows, I will permit him to testify.

Q. (By the Court): Has that ever occurred?

A. (By the Witness): No, your Honor. Supplementary riders cannot be issued for a period longer than the policy, original policy period to which——

Q. (By the Court): You mean the remainder of the original period. In other words, in this case, as I understand it—now, I want to be sure I understand it—the original policy was issued in '39, is that correct?

Mr. Clausen: Yes, your Honor, in February of '39.

The Court: And then the subsequent policy, that was a 20 pay life policy?

Mr. Clausen: 20 pay life policy with a twenty year family income rider. And the second policy, the first application for conversion made in May——

The Court: Of 1939.

Mr. Clausen: Of 1939 and found to be defective with respect to the family income rider, so that an application in July for a 15 year income rider was made by the insured——

Mr. Burns: Which the company directed to be made on that term. [64]

Mr. Clausen: And the application for conversion, as he has testified, was defective in not putting down the terms.

(Testimony of Dennis J. Lawton.)

The Court: Well, the witness has given an answer. Do you have any further questions?

Q. (By Mr. Clausen): Does the company keep a copy of the policy itself after issuance to an insured, to your knowledge? A. No, they don't.

Q. They do not?

A. They retain the original applications.

Q. Do you know the company accounting practice in the home office with respect to computing the periods in which premiums must be paid?

A. Yes. It's the term——

Q. And what is that practice?

A. It's determined from the original applications for the policy.

The Court: Mr. Clausen and Mr. Haas, so that you will understand this, I assume that practice of the insurance companies, including this one, is that all of their policy writers, except that which might be some special matter, are issued on forms. And while they may not keep a duplicate copy of the policy that is issued, it's a policy that's on a form and filled out in a certain manner, isn't that it?

Mr. Clausen: Yes, your Honor. You see, they [65] don't keep a duplicate is what I mean. They don't keep a duplicate. They have forms, of course, specimens of the particular type of policy.

Q. (By the Court): All right. Do they maintain or keep any record that would show how the blanks on a particular policy, blank spaces, how they are filled in or anything that is typewritten

(Testimony of Dennis J. Lawton.)

or printed other than the form itself; do they keep any duplicate of that?

A. (By the Witness): They retain the original form, your Honor and photostat it and attach the photostat of the copies to the policy that is issued. They retain the original applications.

Q. (By the Court): Well, they retain the original applications. But when a policy—take a policy form, and it's then filled out, certain blank spaces, or the policy is printed with certain standard provisions in it, and then in certain spaces are typewritten certain information. Now, there is a carbon kept of that or a duplicate kept of that which is typewritten into the spaces such as amounts of money, names, period of time.

A. (By the Witness): No. That is taken from another department onto the records. The form number on the policy that is issued is stamped on the original application, and the policy is typed from the information on the application. It is supposed to be checked and is then checked by the person who approves it.

The Court: All right.

Q. (By Mr. Clausen): It is the Defendant's practice, to your knowledge, Mr. Lawton, to issue a policy for supplementary provisions for family income in strict conformance with the applications therefor?

A. Yes, provided they accept the risk.

Q. What would have been the practice of the

(Testimony of Dennis J. Lawton.)

company had the insured in this case paid a premium on the 11th year?

Mr. Haas: I will object to that question on the ground it is so remote and hypothetical. The man died six years after the policy was issued. Now counsel wants this witness to tell us what the home office would have done if he had lived five years more and paid another premium. I think that is so remote that we can't possibly know the answer to that question.

Mr. Clausen: I am asking for the practice. I will make it a supposition. Suppose——

Mr. Haas: You mean there is a practice of writing these policies and doing something with them?

The Court: I don't think you want to know—— what are you going to do?

Mr. Clausen: It is a hypothetical question, what would happen in a hypothetical case.

The Court: All right. I will permit you to do it. I don't know—— [67]

Q. (By Mr. Clausen): All right. Suppose you had a 15 year family income rider, premiums payable for 10 years. Suppose the insured, by mistake, paid a premium in the 11th year. What is the company's practice regarding the keeping or returning of the premium?

A. Well, he would be billed for his correct premium.

Q. Now, you say he is billed for his correct premium?

(Testimony of Dennis J. Lawton.)

A. Before it's due, about a month before it would be due.

Q. Now let's assume that he through excess generosity paid the premium before the bill is received by him, what is the company's practice?

A. Well, it's quite possible if it came to our office the girl would send it through to the home office as it was paid. But then the home office would send their statement on it and issue a receipt on it and ask us to refund the overpayment to the insured with the receipt by form of a check.

Q. And has that happened in the past?

A. Yes, frequent errors occur on premiums and the amount.

Mr. Clausen: All right. I have no further questions. I wonder if I could have a five minute recess?

The Court: Well, you may. I have a grand jury coming in very soon. I think perhaps then we should recess the matter over until this afternoon, if that is the situation. How long will you be? [68]

Mr. Haas: I have very little. There are just a couple of points I would like to clear up with this witness.

The Court: Do you have any further questions?

Mr. Clausen: Of this witness?

The Court: Do you have any other witnesses?

Mr. Clausen: No other witnesses, your Honor.

The Court: Well, I will declare a brief recess. But if the Grand Jury adjourns we'll just have to——

(Testimony of Dennis J. Lawton.)

Mr. Clausen: I am ready to go in five minutes again, your Honor.

The Court: We will take a brief recess.

(Recess.)

The Court: Are you ready to proceed now?

Mr. Haas: Yes, your Honor.

The Court: Mr. Lawton, would you step forward and take the witness stand. I may have a phone call that I will have to take. As soon as it occurs, I will take a recess in this matter, if it's necessary, but it won't be very long. All right, you may proceed with your cross examination.

DENNIS J. LAWTON

a witness called by the Defendant. Previously sworn.

Cross Examination

Q. (By Mr. Haas): Mr. Lawton, I believe you have testified that Martin Troutfelt had a life insurance policy with your [69] company which preceded this one, a 20 pay life policy which preceded this one? A. That is right.

Q. Do you know what the total amount, the total annual premium on that policy was, or can you ascertain it from the records that are in evidence before you?

A. No. There are only quarterly payments dated on there: that is the payments that were selected at the time of application.

Q. What were his quarterly payments on that policy? A. \$66.60 every three months.

(Testimony of Dennis J. Lawton.)

Q. \$66.60 every three months. And that is on the 20 pay life policy? A. That is correct.

Q. Now can you tell me what the quarterly premiums were on policy number 3223099, Plaintiff's Exhibit 1 in evidence here?

A. The annual premiums?

Q. The quarterly premiums, if you can tell us that.

The Court: Or could you compute it within a very near figure?

A. (By the Witness): Yes. They would be—it would be approximately 27 per cent, 26.5 of the annual premium.

Q. (By Mr. Haas): Well, can you tell us in dollars and cents what the quarterly premium was on that policy? By that policy, I mean the policy here in suit. [70]

A. No. I need a rate book.

Q. Can you tell us from your file here?

A. Oh, yes, yes. The quarterly payment would be \$104.30.

Q. That is the quarterly premium on the policy in suit was some \$40.00 more than the quarterly premium on the policy which preceded this policy in suit?

A. That's correct because of the difference in price.

Q. Now inviting your attention to this form, which is called "Application to the John Hancock Mutual Life Insurance Company of Boston for Supplementary Provisions for Family Income,"

(Testimony of Dennis J. Lawton.)

which is in evidence as Plaintiff's A, and which your Honor has also attached to the policy a photo-static copy thereon, as I understand it this form when completed was mailed by your office to your home office in Boston, is that right?

A. Correct.

Q. And upon receipt of that application, the company in Boston prepared Plaintiff's Exhibit 1 in evidence, this insurance policy, is that correct?

A. On this and together with the other forms they already had, the original application for conversion, this one.

Q. I understand. What I am getting at is Plaintiff's 1 in evidence, this insurance policy, was written in Boston, Massachusetts?

A. Correct.

Q. You didn't write it? [71]

A. That is right.

Q. And nobody in your office wrote it?

A. No.

Q. And then in some way the insurance company delivered policy to the insured, is that right?

A. Yes, that's right.

Q. Do you know how?

A. No, I couldn't—it was delivered possibly by mail, but I——

Q. I am asking you if you know?

A. No, I can't recall.

Q. You don't know how it was delivered. Do you know where it was delivered?

A. In New Mexico.

Q. On what do you base that statement? You

(Testimony of Dennis J. Lawton.)

say you don't know how it was delivered. If you don't know how it was delivered, how do you know where?

A. Because we were required to forward a receipt for the payment of the premium which would be attached to the policy and delivered at the same time.

Q. Would you clarify that for me? I don't think I understand.

A. And the policy would not go into effect until the premium was paid, and it would not be delivered until the premium was paid. [72]

Q. You mailed some document from San Francisco to New Mexico, is that right?

A. The policy?

Q. No, some document. You said you mailed a receipt? A. Yes.

Q. To New Mexico? A. Yes.

Q. And why does that make you believe that this policy was delivered in New Mexico?

A. Because on a conversion it's the practice to send the receipt and the policy under cover of a letter.

Q. But you just told me that you didn't send the policy, that somebody in Boston sent the policy. A. To our office.

Q. Oh, the policy was sent then, this paper, Plaintiff's Exhibit 1, was sent to San Francisco?

A. Correct.

Q. To your office, and you sent it somewhere?

A. Correct.

(Testimony of Dennis J. Lawton.)

Q. Then you do know how it was delivered?

A. Well, I couldn't swear to it. But that is the practice of our office. When a policy is changed and its receipt from the home office, the premium is paid, the receipt is issued. And the policy and the receipt with a covering letter, the letter of transmittal, is sent to insured, if he [73] resides out of the City or out of town.

Q. By mail? A. Correct.

Q. Do you have the covering letter?

A. No, sir. I am not in the office any more. I worked on it at that time.

Q. Is there a covering letter somewhere in the files of John Hancock?

A. I don't know if it would be important enough to be retained for 14, 15 years.

Q. I understand your testimony to be then that the ordinary practice would be for this piece of paper, Plaintiff's Exhibit 1 in evidence, to be mailed from San Francisco to the residence of the insured?

A. Correct.

Q. And that's your knowledge of the way this policy was delivered?

A. Yes. That was the general—that's the regular practice.

Q. I see. Again inviting your attention to the application for supplementary provisions for family income, as I understand your testimony, the typing on this form, to-wit, the name "Martin E. Troutfelt", the figure "15", the figure "10", and the

(Testimony of Dennis J. Lawton.)

figures “\$44.30”, were typed in your office in San Francisco, is that right?

A. It was typed at the home office or in our [74] office at the direction of the home office.

Q. That is, you don’t know where it was typed, these figures?

A. Well, one of two places; at our home office or in our office at the direction of the home office.

Q. In any event it was typed by someone in the insurance company? A. Correct.

Q. And it was not typed by Mr. Troutfelt?

A. Correct.

Mr. Haas: I have no further questions. Thank you.

The Court: Any further questions, Mr.—

Q. (By Mr. Haas): It is a fact though, isn’t it, Mr. Lawton, that the premiums for the various types of coverage in the policy sued upon in this case were broken down on the face of the policy?

A. Right.

Q. And it is the fact, isn’t it, Mr. Lawton, that the original application for conversion of the old policy was defective in that the term of the family income rider was not stated on that application and the company so informed you?

A. That is correct. The company has to have the definite period of years because if the period is not correct they cannot attach—issue the policy with the rider applied for. So it has to be specified and no rider can extend the period of the policy.

Q. Now did you check with Mr. Elman, Presi-

(Testimony of Dennis J. Lawton.)

dent of John Hancock here in San Francisco, for records and correspondence relating to the delivery of this policy? A. Yes, I did.

Q. And is there such correspondence?

A. It cannot be located.

Mr. Haas: That is all, Mr. Lawton.

Redirect Examination

Q. (By Mr. Clausen): In what way, Mr. Lawton, would you be notified by the home office that the application for conversion of the 20 pay life policy was defective?

A. Through correspondence as per memorandum on the home office copy of the original application.

Q. You are pointing to the entry 6-23-39?

A. That's right.

Q. Date of letter "To 6/23/39"?

A. That is a letter to the district office.

Q. "From: 6/27/39"?

A. That is from the district office to the home office.

Q. The name of the correspondent "F-1"?

A. Yes.

The Court: I have that phone call and I will take a brief recess at this time.

(Recess.) [76]

The Court: Now, Mr. Haas, are you going to be very much longer?

Mr. Haas: About three minutes, your Honor.

The Court: All right, proceed.

(Testimony of Dennis J. Lawton.)

Recross Examination

Q. (By Mr. Haas): You have pointed, sir, to a pencilled notation 6-23-39, to, from 6-27-39, name of correspondent is F-1, regarding, and then it says Re FI? A. Yes.

Q. Is it your testimony that that was a letter from the home office to your office?

A. The original, the two, yes.

Q. That is? A. 6-23-39.

Q. A letter dated June 23rd, '39 was written from the home office to your office?

A. Right.

Q. And the subject of that letter was family income, is that right?

A. It was in connection with an error on the application for conversion. The term of the family income provision was not specified, which is required.

Q. How long has it been since you have seen that letter? A. Which letter? [77]

Q. The letter we are talking about, the letter dated June 23rd, 1939?

A. Well, I haven't seen it since July of 1939, but—and the following forms here tell me what it was about.

Q. Show me how they tell you what it was about.

A. This application for conversion doesn't specify family income terms.

Q. Then what you are saying is you are deducing all this from the forms here?

(Testimony of Dennis J. Lawton.)

A. No, from knowledge of the facts of processing so many typed transactions.

Q. All I am asking you is, sir, do you recall what the letter said? I am not asking you to deduce what you think the letter said. But do you recall what the letter said?

A. No, sir, I don't.

Q. Then you are just telling us that from looking at these forms you assume that that letter said something?

A. I know for a fact that this form—they couldn't issue a policy on this form because it does not specify a term.

Mr. Haas: Very well. I have no further questions. Thank you.

The Court: Any further questions?

Mr. Clausen: Just one. [78]

Further *Recross* Examination

Q. (By Mr. Clausen): These notations in those forms and the sequence refreshes your recollection about the general content of that letter, doesn't it?

A. Well, they have a record of all correspondence relating to a policy since it was issued.

Q. But I am looking——

A. The forms tell me that they had to be submitted.

Q. It refreshes your recollection, isn't that correct? A. That's right.

Mr. Clausen: That is all.

Mr. Haas: I won't pursue the matter.

The Court: It simply goes to its weight. Now is there any further evidence?

Mr. Clausen: Your Honor, the defense rests.

Mr. Haas: The plaintiff rests, your Honor.

The Court: Now then, what do you want to do about submission in this matter as to briefing the law questions?

Mr. Haas: Anything that suits your Honor is perfectly all right.

The Court: I presume that you gentlemen have your law pretty well assembled. How much time do you want?

Mr. Haas: Do you want me to start, your Honor?

The Court: Well, of course, actually I think [79] unless you want to waive opening and closing, that is up to you. You made the prima facie case, it's up to them now. If you want to reverse the order of briefing, it's satisfactory with me, but you have the privilege, Mr. Haas, of opening and closing.

Mr. Haas: I will certainly exercise it because that permits me to write twice as much.

The Court: I hope not. Then how much time do you want to open, Mr. Haas?

Mr. Haas: Five days will be quite sufficient.

The Court: What is your situation?

Mr. Clausen: I would prefer ten days to reply.

The Court: You want ten, ten and five then?

Mr. Haas: Ten, ten and five is perfectly agreeable.

The Court: All right. When will that put it down?

The Clerk: That puts it down, your Honor, for March 6th. The following Friday would be March 11.

The Court: Well, the 6th is a Sunday. All right, I will put the matter—in other words, where these days fall on a holiday, why, you can extend your time to one day. But I will put the matter down for March 11th for submission. I want all the briefs in by that time. Ten, ten and five will be the order and then the matter will come on for submission. It's not necessary for you to be here on submission. It will just come on the calendar and be submitted. I want to get this law question ironed out in my mind. I think I have the [80] facts fairly well straight. Let's see if we can't get this disposed of as quickly as possible. You gentlemen appear to have a good grasp of the case. See if you can't view it as briefly as possible. That is all I am interested in.

All right. That will be the order.

Mr. Haas: Thank you, your Honor.

Mr. Clausen: Thank you, your Honor. [81]

[Endorsed]: Filed June 24, 1957.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Settlement of Findings

Friday, June 24, 1955

The Clerk: Cohen versus John Hancock Insurance Company, settlement of findings.

The Court: All right.

Gentlemen, would you step forward?

Now, I put these findings down for settlement because of some rather violent differences on findings, and one conclusion as it affects the judgment, that is, the manner in which this amount of money should be paid. I call counsel before me because I want to determine the issues and get the findings and judgment—the findings and conclusions signed and entered in the judgment, signed and entered.

Now, first of all, coming to the amount of money here and the manner in which it is to be paid. The plaintiff contends this is an anticipatory breach, and therefore the full amount comes due. I take it it's the defendant's position that the money should be paid in accordance with the provisions of the policy?

Is that correct?

Mr. Clausen: That is correct.

The Court: In other words, the payments that have not been paid should be paid in a lump sum. Then as to the future payments, they should be paid in accordance with the provisions of the policy. Is that correct?

Mr. Clausen: Yes, that is correct.

The Court: Now, Mr. Haas, I want to get this [2] anticipatory breach started. In other words, I don't want to make any more trouble than is necessary. I want to conclude this matter as rapidly as possible. If this comes within the anticipatory breach rule, I presume you would concede that the lump sum would be due and payable, is that correct?

Mr. Clausen: That is correct.

The Court: But you claim that this simply doesn't fit the anticipatory breach rule, is that correct?

Mr. Clausen: What about that, Mr. Haas?

Mr. Haas: Well, we, of course, think it does, your Honor. We have read counsel's case here, that Briggs case.

The Court: Yes?

Mr. Haas: And I have read it and run it down. I come up with a case in 23 Cal. (2d), the Caminetti case, which is a unanimous decision of the Supreme Court, some eight or nine years later, after the Briggs case——

The Court: I want to get that citation.

Mr. Haas: It's 23 Cal. (2d). It begins at page 94.

The Court: 23 Cal. (2d), 94.

Mr. Haas: That case, your Honor, is one in which——

The Court: It's 23 Cal., 94?

Mr. Haas: The case begins on 94.

The Court: At what page?

Mr. Haas: At page 104 the Court discusses——

The Court: Now, what is the title of the case?

Mr. Haas: Pardon me. Caminetti versus Pacific Mutual Life Insurance Company.

The Court: He was then the insurance commissioner?

Mr. Haas: Yes, your Honor. This involved an insolvent insurer.

The Court: All right.

Mr. Haas: Now, in the defendant's case of Brix

and others, which can be found from the Brix case, you have a situation in which the insurer's obligation to make monthly installment payments flows from accident-disability type policy in which the payee of the money is entitled to the installments if—but only if at some future time he is disabled and is losing time, and so forth. That, I think, is apparent from the Brix case itself. On page 104 of the Caminetti case the Court says:

“In the instant case the old company is insolvent and being liquidated, it cannot perform under the non-cancellable policies it had issued. They have, in effect, been cancelled. The situation is thus analogous to a breach by anticipatory repudiation.”

They are talking about life insurance, which is the kind of contract involved in this case. Anticipatory breach is recognized in California. Upon the repudiation, the promisee may immediately bring an action for future damages, citing cases.

Then skipping down to where they talk about [4] the Brix case, the case of Cobb versus Pacific Mutual, Brix versus Peoples Mutual and the Robinson case which I have in the memorandum, they

“were concerned only with the question of recovery of the payments which might become due for continuance in the future of the existing disability as well as payments past due. There was not involved the issue of damages for total repudiation of the contract of insurance * * *”

and so forth.

Here we have a case in which, as counsel concedes, the payments are fixed and must be paid. It has nothing to do with the condition of the health of the plaintiff in this case.

The Court: Well, there is no question about that. The problem is whether that is an anticipatory breach. To be very frank with you I didn't give much attention to that in the memorandum. I followed your theory. I was more concerned with the question of whether or not they had a right under the policy to refuse to pay, and whether they were entitled to reformation of the policy. Of course, that was a mistake.

Mr. Haas: Of course, it's an admitted fact here that the defendant insurer has written the plaintiff and said, "We are not going to make any more payments."

The Court: I don't think there is any argument about that, is there?

Mr. Clausen: Of course not, your Honor. This situation is actually just the same as a health insurance repudiation, [5] because the particular beneficiary here concerned might die tomorrow. Of course, the family income payments to her would cease, but would go over to the contingent beneficiary. It's almost precisely the same. The reasons stated in these cases, *Briggs* and the *Cobe* case, apply just as much as in the health insurance case. You can't have an anticipatory breach under a unilateral contract.

The Court: Well, I will have to give attention to it. Do you have any other cases, Mr. Haas, on it?

Mr. Haas: No. That is the only one I wish to call to the Court's attention.

The Court: Fine. I have that.

Now then, I want to go back to the matter of the findings themselves.

Mr. Haas: On the matter of the findings, I wonder if I might just run through them quickly?

The Court: Of course. Would you proceed? We will start with the plaintiff's findings as I directed plaintiff to prepare them.

Mr. Haas: Very well, your Honor.

The Court: And then you can take the objections the defendant makes as to each one. I think some of the objections I found in the sense that I don't think they have changed the legal effect in any way. But I do think that if perhaps the facts were as suggested, I think there are a couple of [6] conflicting points in which he wants me to find on the basis of which I could not find——

Mr. Haas: I think so. As I understand it, there is no objection to the plaintiff's proposed Finding No. 1.

Is that right, Counsel?

Mr. Clausen: No, there is not.

Mr. Haas: Or No. 2, or 3, as written. But defendant wishes to add something at that point, isn't that right?

Mr. Clausen: Well, there is a separate paragraph.

The Court: Do you have any objection to the separate paragraph which is proposed here, Mr. Haas?

Mr. Haas: My only objection is this, your Honor: I haven't studied it carefully for his accuracies. But I will assume it's accurate. I think it's evidentiary.

This is an action not on Policy 3171136 in the amount of \$5,000, but on the policy which was subsequently issued in conversion of this policy. All these facts may be true, but it seems to me that the purpose of findings is to find the ultimate facts which are in issue in this case.

The Court: I will agree with that.

Mr. Haas: If this is the case, as I think it is, counsel is fully protected by the record if he wants to make some argument from this evidence. But I don't think it's relevant in determining what the rights of the parties are under the contract in suit to have a finding that there were some other [7] contracts entered into by the parties prior to the contract in suit.

Frankly, I had considerable difficulty in knowing where to stop in these findings. I finally decided that the only way we could keep the thing within reasonable bounds was just to get to the ultimate issues as we saw them and find on them.

The Court: Well, how, Counsel? Why is this necessary to be added?

Mr. Clausen: I think it's an accurate statement of the evidence——

The Court: But is it not an evidentiary matter?

Mr. Clausen: It is evidentiary, your Honor, for the reason it's added—we deem the two policies to be interrelated, all one contract.

The Court: That may be, but I don't think——

Mr. Clausen: And a modification of the original contract.

The Court: I just think it adds to the verbiage and doesn't add to the ultimate facts. So I will not accept that suggestion.

Mr. Haas: Now, I think plaintiff's proposed 4 and 5 might be treated together, your Honor. As to each of those, the defendant wishes deleted to substitute Paragraphs II and III.

Now, the basic issue, of course, in this case is whether or not there was a contract between the plaintiff and the defendant, a life insurance [8] contract.

In Paragraphs III and IV of the plaintiff's complaint it is alleged:

“That as of February 24, 1939, Martin Troutfelt, as insured, and defendant as insurer, entered into a written contract of life insurance on the life of Martin Troutfelt.”

The contract was represented and evidenced by defendant's policy No. 3223099, together with supplements. One of the supplements attached was a provision for family income, a true and correct copy of which is attached hereto as Exhibit 1 and made a part hereof.

Now, our proposed findings 4 and 5 found on the issues made by those allegations of the complaint—specifically, we propose the findings that the defendant as the insurer and Troutfelt entered into a contract of life insurance. The terms are

contained in a certain policy. The plaintiff was the beneficiary, and so forth.

Proposed Finding 5: As part of the contract there were several supplements, one of which is supplementary provision for family income. Then we set out what the terms of the provisions were in the supplementary provision for family income. These, it seems to me, your Honor, are the very substance of this lawsuit.

The Court: Well, I don't think they should be stricken. I agree with that. I mean, I think that [9] they set forth the substance. But I am concerned in this respect, with the fact that there is no place in the findings where it is found that a clerical mistake was made. I think the evidence establishes that, and the decision of the Court proceeded on that assumption.

Mr. Haas: Your Honor, I am aware of that.

The Court: In other words, I think you are entitled to a finding of that nature.

Mr. Haas: Very well, your Honor. We made no such finding for this reason: We, in our Paragraph VII—to get ahead a little bit—there is a finding that “Any mistake in writing”—this mistake——

The Court: Yes, I understand. You provide that any mistake that was made——

Mr. Haas: ——was not a mutual mistake; was a unilateral one.

The Court: That is true. I will go along with you on that. But I think there should be a provision——

Mr. Haas: We have no objection——

The Court (continuing): —to conform with the allegation with Paragraph III, a suggestion that is made by the defendant in this matter.

Mr. Haas: I have no objection to a finding. We didn't find it because we believed it to be irrelevant. But if such a finding is required by the Court—— [10]

The Court: I think that is the assumption on which the decision proceeds, and——

Mr. Haas: I am sure that I can get together with counsel and propose one. Here, again, counsel proposed insertions. I think they are not limited to a mere finding, that this was a clerical mistake, but they are evidentiary after the original policy was issued.

The Court: I agree with that. That is why I said he is entitled, however, to a finding on the question of——

Mr. Haas: Very well, your Honor.

The Court: That there was a mistake made, a clerical mistake made by the scrivener of the company.

Mr. Haas: I am sure that counsel and I can work out such a finding. And that is as I deem a fact. and that is an assumption. Now, we will get together, then, and propose a proposed finding on that to be added.

The Court: Then that will satisfy that phase of it. If you can't agree, I will settle it for you. But I am sure you can.

Mr. Haas: Then I take it that 4 and 5 of the proposed findings are satisfactory to the Court, and

we will put in a finding that there was a mistake.

The Court: Yes. I have no quarrel with the finding as proposed. I just think that there should be an additional finding in that respect, because I [11] think the findings as you have proposed them presupposes that there was a mistake, and I think it should be said, and specifically.

Mr. Haas: Very well, your Honor.

Now, Plaintiff's Proposed Finding 6, the defendant wishes that deleted and another finding inserted here. I think that this finding is argumentative, and I think contrary to the decision of the Court. Once the Court determines that is the contract——

The Court: Yes?

Mr. Haas (continuing): ——between the parties, then it immediately follows that Troutfelt performed in accordance with the contract. What counsel wants us to do now is to say that the defendant charged the *insurer* a premium which was correct for the rider applied for, but was \$10.00 per year less than the correct premium, and so forth.

The Court: That is evidentiary, again.

Mr. Haas: I think it's that, exactly.

The Court: I agree with you on that. You don't have to—I don't think that is necessary to the—I think that is a fact, but it's the presumption upon which the decision proceeds, but it is not an ultimate fact.

Mr. Haas: Yes, your Honor.

Then Paragraph VI of the proposed findings of the plaintiff is satisfactory, your Honor?

The Court: Yes. [12]

Mr. Haas: There is no objection to Paragraph VII, is there, Counsel?

The Court: No, there is none.

Mr. Clausen: No.

Mr. Haas: No objection to Paragraph VIII. However, at this point the defendant wishes to insert the following:

“The application for policy No. 3223099 was made in New Mexico; premiums were made from there; policy was delivered there; contract was to be performed in New Mexico, and at all times the insured was a resident of New Mexico.”

Now he says that is the applicable State law.

The Court: I think it is. I think he has a very fine motive behind it.

Mr. Haas: There is no doubt about that. Quite inconsistently, however, when we attempt to find a finding that the policy did contain an incontestability clause, he wants it deleted as being not material. Well, what I have to say is this: Perhaps we could discuss these two matters together, because they are interrelated.

We have proposed a finding that there was an incontestability clause, and counsel has proposed one attempting to, so-called, “fix” the State law. So far as we are concerned the incontestability clause appears in the contract, and whether we have a finding that there was one or not isn’t [13] going to make any difference. That is just part of the contract.

We were thinking this way: that if counsel

should seek to appeal this case, it might be easier for the Appellate Court to just have the thing right before them in the form of a finding, rather than to have to go through that enormous document and locate the thing. However, as to defendant's proposed finding here, I don't think the evidence supports it.

The application was made in New Mexico. I think that is probably true. At least I think the application says on its face that it was mailed from New Mexico, or something. I am a little hazy as to the details. Premiums were paid from there. I don't think there is a shred of evidence as to where premiums were paid from. The policy was delivered there, as I recall the testimony of the Witness Lawson.

Mr. Clausen: I believe so, yes.

Mr. Haas: I think he said they mailed it to New Mexico, which would support that finding. The contract was to be performed in New Mexico. Of course, the contract is being performed right now. And as I understand the law, it's going to be performed where the beneficiary is. Now, they say the insured was a resident of New Mexico. I don't think there is any evidence as to whether the insured was a resident at any time.

The Court: Well, it raises a question. I don't [14] know the ultimate result will be changed, although it might be more arguable under New Mexico law, that he may be determined relieved of the unilateral mistake, *then* we could, under the California law. I gather that is the reason for this par-

ticular provision here. I gave consideration to that, and concluded that under either law, it wouldn't make any difference. But I may be in error on that. That is a matter which could be argued, if there is further appeal. I am inclined to—my recollection of the evidence is that the evidence is not clear enough for me to find that.

Mr. Haas: That is my recollection.

The Court: While there may be some evidence that would point to some of the statements there, I don't think I can find as positively as it was there said, "There is no question but what these people were in New Mexico and the policy was mailed to them there." I am sure of that. But as to the place of performance, and so on and so forth,——

Mr. Clausen: May I have a word, your Honor?

The Court: Yes, certainly you may.

Mr. Clausen: On the exhibit of ours with all those documents attached more than suffices for each of these statements, except the one about where the contract is to be performed. And that is an admitted fact, that beneficiary is a resident of New Mexico.

The Court: Well, as I say, I don't know [15] whether I could quarrel with that. I would think that the evidence might indicate that. But I wouldn't say that I would be disposed to find it. And is it necessary that that be found? That is the point. In other words, you are right on your right whether you have a finding on it or whether you have a finding—there is no finding against it.

Mr. Clausen: I have done some research on this problem of applicable law. I find it very confused. And so sometimes they say it depends upon where the premiums are paid from, sometimes where the beneficiary is, or where the contract was made. In this case we have, we purposely put into evidence—my recollection is that we did have evidence on each of these points. We had it in mind, so that we would satisfy each one of those particular tests.

The Court: Yes. I say that I consider it a question of applicable law, and arrived at the conclusion, as I did, so stated in the opinion. But I arrived at the conclusion that there is no fundamental difference between the law of California and the law of New Mexico.

As I say, however, that may be a question upon which minds might differ. I don't want to foreclose you from making your point if you feel it should be made.

However, I am doubtful that it should be found upon—the evidence is as it is. I don't think it's necessary for me to find that. I simply concluded, after checking your New Mexico [16] situation, that the law wouldn't be different either place, and decided the case upon that basis. So I don't propose to find in accordance with the amendment. I don't say that it is correct, but I just don't think I have to find on that. I will take the Finding 8 as it is proposed, because there is no objection to that. All you want is an addition——

Mr. Haas: Plaintiff's Proposed 8 the defendant wishes deleted. That is the finding in which we

propose that in the exercise of ordinary care, reasonable diligence could have discovered its alleged mistake in 1939.

I rely for that finding, your Honor, on the opinion, page 3, line 25:

“There is no proof of facts tending to excuse defendant’s failure to discover its mistake within three years after it occurred.”

Now, the burden of proving and pleading discovery is on the defendant. So when there is no proof, there is only one possible finding, and that is when they could have discovered it.

The Court: Well, I didn’t know whether I am entitled to go back to that 1939, but I did go back past the statutory period in this case. I concluded that at least there was a period of time—now, I forget the precise date of plaintiff—1945—at which there should have been a discovery, and which carries them back. Now, I didn’t stop to analyze the [17] facts any further once I got past the statutory period. I still believe that this is a type of mistake that should have been discovered by the defendant. This isn’t a mistake that can be charged to the plaintiff in this case, or to the plaintiff deceased. Therefore, my only problem concerned with me is the date that is fixed here.

Mr. Haas: Well, I should point out that perhaps we could discuss 9 and 12 together, your Honor, because our proposed finding reads:

“In the exercise of reasonable care and reasonable diligence, defendant could have discovered his mistake in 1945.”

The defendant makes no objection to that finding.

The Court: I agree. I mean, I just didn't—to say very frankly, I didn't go past 1945 in my own thinking in the matter.

Mr. Haas: Perhaps counsel would be satisfied if we just took 12 and put in 1939, or at the latest in 1945.

Mr. Clausen: No. Why even have anything concerning 1939? To begin with, the finding is not correct. There is evidence in the record which would go to the issue of whether they exercised ordinary care, reasonable diligence, prior to 1945.

Mr. Haas: Yes. But the opinion says:

“There is no proof of facts tending to excuse defendant's failure to discover its mistake within three years after it occurred.” [18]

The Court: That is true.

Mr. Haas: That means that you signed an instrument, and there is no proof that you didn't know—there is no proof that you didn't read it, and that sort of thing.

The Court: I agree with you, Mr. Haas, for my recollection of the evidence is there is no reason why they shouldn't have done it earlier. But I came to this '45 date, and I concluded that there was no excuse for not discovering it then, whatsoever. I mean, it's just a plain mistake. And in the mistake, the mistake of the company, it's not the mistake of the insured. The insured had the right to rely upon what he thought was an accurate thing, and the payment of money involved was so small that he couldn't be put on notice as to what

different premiums would be paid. There is no notice to him, and he had—he wasn't right assuming he had a policy with certain provisions in it.

Now, my philosophy is that I find in accordance with the theory of the case. I do not want to make findings which are unfair or unreasonable from the facts. But I think that I should find fully on the theory of the case. And therefore, as it is my present thinking, while I didn't go back past 1945, I think that the theory of the case would indicate that that is a finding that should be made. It isn't as clear-cut as the 1945 one. [19]

I would be inclined to leave the findings the way they are, unless there is some other reason that you want to point out to me why that should be deleted as to Paragraph IX.

Mr. Clausen: Well, the reason only is that I don't believe the finding is supported by the evidence. And I set forth the evidence in my objections to the finding.

The Court: Yes, I am aware of that.

Mr. Haas: There is no objection, your Honor, to Finding 10. Through our typographical error, there is no proposed finding of 11. It skips from 10 to 12. There is no objection to Plaintiff's Proposed 12.

Now we get to Plaintiff's Proposed 13, which the defendant wishes to delete.

13 is:

“It is not true that defendant discovered its alleged mistake in 1954, but on the contrary, it

discovered its alleged mistake in 1939, or at the latest on July 26, 1945.”

As your Honor is aware, the defendant has a counterclaim on file herein, in which it is alleged, as it must be, that they discovered their mistake in 1954.

The Court: Yes.

Mr. Haas: The Court’s opinion holds that there is—:

“Therefore, it is the conclusion of this Court that by the exercise of ordinary care, the [20] defendant could have discovered its mistake in 1945.”

As a consequence of which it immediately follows the burden of proof being on the defendant, that if they could have discovered it, they would discover it.

The Court: I would say that is true.

Mr. Haas: Discovery being a word apart.

The Court: I will accept Finding 13.

Mr. Haas: There is no objection to 14, your Honor.

Now, when we get to 15——

The Court: Yes, that is the one that goes——

Mr. Haas: That goes to the anticipatory breach thing. As I understand it, there is no objection by defendant to the first sentence of the finding, Proposed Finding 15. They simply wish deleted the last sentence thereon. That raises the anticipatory breach question that we have already discussed with your Honor.

Now, 16 the defendant wishes deleted as imma-

terial. And as our only reason in inserting it, your Honor, was so that should the defendant appeal we would, of course, wish to raise this question. And I think the facts that we asked the Court to find, i.e., that it was necessary for plaintiff to employ an attorney, and so forth, are obviously true or we wouldn't be standing here today.

I am just trying to avoid a situation which, if the defendant should appeal, and the Court of Appeals should conclude [21] that we were entitled to some remuneration under this provision of the policy, there would be a finding, and alleviate the necessity of having to make the necessary findings.

It's an issue in the case, and I think it follows the opinion. And the only question is whether or not it is in the Court's view immaterial.

The Court: I don't know the materiality of it, myself, but I wondered why it was necessary to find on that.

Mr. Haas: Certainly it is material. I would agree with the defendant to set forth what the policy states, other than for mere clarity and to make the thing easy to handle. I think that if the point is going to be made on appeal we would have to have a finding that it was necessary for the plaintiff to employ an attorney to commence and handle the action, although perhaps even that would appear from the records of the Court——

The Court: I decide that point in your favor?

Mr. Haas: That is right, your Honor.

The Court: I just don't seem to think——

Mr. Clausen: This is completely immaterial. The Appellate Court, of course, is going to notice that the plaintiff is represented by counsel. If they want to raise this point on appeal they are welcome to do so.

The Court: Well, I see no reason for finding it. I think you have your right to raise it, anyway, if you want to. I don't see the necessity for finding 16, and I don't think [22] there is anything wrong with the finding.

Mr. Haas: 17, your Honor, is of the same type, that is, we have set forth the uncontestability clause, so that it can be conveniently available in the event the defendant should appeal here.

The Court: I don't think it has to be found. It's in the policy. You can argue it.

Mr. Haas: Yes, your Honor.

The Court: It may go out, too.

Mr. Haas: There is no objection to Finding 18.

The Court: Yes, that's right.

Mr. Haas: And before we leave the subject of these attorney's fees, so-called, I wonder if I could have another word. The fact that we are out here again today indicates to me that this thing may be going on for some time. We have heretofore requested an allowance of attorney's fees. I think our characterization of the award has been most inept. Of course, the Court has quite naturally viewed it from a standpoint of attorney's fees because that is the presentation made by the plaintiff.

I think on analysis, what the plaintiff is seeking here is merely damages for breach of a warranty.

The Court: I see. And as part of the damage, you contend that there should be attorney's fees awarded, or there should be an amount put in? [23]

Mr. Haas: Let me put it this way, your Honor: If this is a warranty, as we believe it is, it's perfectly plain. Then the measure of damages for that breach of warranty is measured by the attorney's fee.

We have a comparable situation, for example, in a warranty deed. The grantor warrants he sold possessions, this, that and the other thing, to defend the title. Now, if a *lost* claim is asserted, and the grantor or warrantor will not defend as the deed says he will, the grantee may defend and recover against his grantor for breach of warranty damages which are measured by the reasonable attorney's fee. That is part of it. It's quite true, as your Honor points out in the memorandum opinion, that there are no expressed promises in this policy to pay attorney's fees, as you find no promissory note if action is brought.

The Court: The contract.

Mr. Haas: That's right. But there are no expressed promises.

The Court: In other words, it's a contractual problem. It has to be provided in the contract, and there is no provision in the contract for it. Therefore, you are not entitled to it under the general theory that each party must bear his own attorney's fees in litigation, unless there is some provision otherwise.

Mr. Haas: Perhaps I am not putting the point over, your Honor. [24]

The Court: I recognize your point now. I hadn't considered it before. It's a novel point, and it's, in general, just a way of getting in the back door to attorney's fee, Mr. Haas. But I don't see that it will work, as Judge —— said in the deciding opinion a few days ago.

Mr. Haas: Of course, that is what judges are for, to decide. I just wanted to make certain that we had got over to the Court what I think is the only possible basis of recovery, which is damages for breach of warranty. Now,——

The Court: I think you are expanding on the original theory, Mr. Haas. This is an attempt to recoup which was decided against you. I see your point, and frankly, if I were a lawmaker, I would have a provision and vote for you. But this isn't the legislative body. This is a judicial body, and I have to decide the law as it is. And I just don't think you are entitled to get attorney's fee in this situation, as much as I would like to see you have it as a matter of policy.

Mr. Haas: Well, I have done the service to the client by presenting the proposition, your Honor.

The Court: And I can't allow my own philosophical thinking to interfere with my interpretation of the law.

Mr. Haas: Now, as to the conclusions, your Honor, the first conclusion, the defendant has no objection, and wishes to have added the language:

“Defendant's defense of mistake is barred

by the provision of Section 3384 of the California Code of Civil Procedure.”

I don’t think this is a conclusion of law. I think that is a reason. I think it’s adequately covered in the memorandum opinion.

The Court: Let’s see. I don’t follow you here. This isn’t in Paragraph I in any way.

Mr. Haas: Conclusions, Paragraph I.

The Court: Yes. They want to add to the one sentence that the Court has jurisdiction over it. They want to add something to it.

Mr. Haas: That’s right, your Honor. They want to add that:

“Defendant’s defense of mistake is barred by the provisions of 3384.”

The Court: Why is that necessary?

Mr. Haas: It’s not necessary, your Honor. I have some difficulty in reading the opinion to determine whether or not you were applying the statute of limitations only to the counterclaim, or both to the counterclaim and answer, because these other findings, of course, all relate to the statute of limitations.

The Court: That’s right. I think the findings are clear enough. I am not going to do anything further on that. [26]

Mr. Haas: Now as to Conclusion No. 2. I think what defendant is attempting to do here is reach the anticipatory breach question again. That is, defendant wishes to delete, on line 6, the words:

“* * * in the sum of \$8,000,”

without substituting anything therefor. So that the second conclusion would read:

“Plaintiff is entitled to judgment against defendant together with interest at seven per cent per annum until the date of entry of judgment on these sums of money together with her costs of suit.”

The Court: I think that is correct, Counsel. You are trying to reach the anticipatory breach question.

Mr. Clausen: We are trying to——

Mr. Haas: May I point out to the Court that time keeps running here, and there are additional \$50.00 payments which are now in default which we would like to add here.

The Court: You can.

Mr. Haas: Paragraph III of the proposed——

The Court: Yes. But I still have to decide your anticipatory breach question finally.

Mr. Haas: Yes, your Honor.

The Court: Now, if I decide that adversely to you, which I want to be clear on it—as I say, I didn’t recognize it, but I didn’t give any complete detailed attention. I accepted [27] your theory, Mr. Haas, really. And this is the point that counsel raises, is the point that has to be very carefully considered. My thought was that “The tail went with the hide,” if I may use an old cattleman’s expression. And since you had already been awarded the hide, I thought that you could just go along and clean the matter up and get the business done. But insurance companies seem to have

some objection to that. Therefore maybe I had better re-examine my position on it.

Mr. Haas: Well, of course, your Honor, your decision on that question will cut through a lot of these problems here.

The Court: Yes.

Mr. Haas: Except there is this one problem which I think will be outstanding: As I understand it—and you will correct me, please, Counsel, if I misstate your position—it's the defendant's position that there should be no declarations of rights at all in this case, and that the only judgment that should be entered is one for payments which are now due.

The Court: Yes.

Mr. Haas: And the direction to pay in accordance with the terms of the policy.

The Court: Of the policy as written.

Mr. Haas: Well, you see, to our proposed judgment, which contains, first, a paragraph declaring the rights of the parties, and second, the money judgment, the defendant proposes objections, and they want to delete the entire first paragraph [28] of the judgment, which is the declaration part of the judgment. Seriously, in counsel's proposed conclusions of law, he, himself proposes a conclusion that the rights and duties of the parties are so-and-so. I am just trying to get straight what the defendant's position is, so that when the Court rules on that anticipatory breach question we will know what kind of a judgment to prepare.

The Court: What is your position?

Mr. Clausen: That is correct, your Honor. As you just stated, that if there is to be a declaration of rights, it is the right of the defendant to pay in accordance with the terms of the policy as written, and the rest of this declaration is unnecessary. I believe that plaintiff's declaration has such words in the anticipatory breach.

The Court: Well, you conclude that if I find there is an anticipatory breach, or conclude as a matter of law there is an anticipatory breach, that then the whole amount is due and payable with interest as indicated, isn't that correct?

Mr. Clausen: They can, your Honor.

The Court: And once that decision is made, then that answers the thing. And if it isn't, then do you still say there may be a problem, Mr. Haas?

Mr. Haas: No. Counsel has cleared it up for me now. As I understand counsel's position, if there is no anticipatory breach, the defendant still wishes the judgment, which does [29] have a declaration in it, along the lines proposed by counsel, himself.

I suggest, your Honor, that on that point now, when I speak of anticipatory, what we are really talking about is a total breach of the contract.

The Court: Yes.

Mr. Haas: And this is an installment contract. There is a lot of law in it. I suggest that we write a letter to your Honor setting forth the authorities.

The Court: I wish you would exchange mutual letters, which you will exchange, setting forth your views on this thing. I think it ought to be done so

that I have it and have the benefit of it, because I am going to have to research that point.

Frankly, I got down to my deciding how I would interpret the policy and the claim, and the question for relief for reformation, and then I came to the question, well, "What judgment is there to award here?" I recognize that there was this argument. But as I say, I didn't know whether it would be a real argument among the parties, and, therefore, decide it on plaintiff's theory. And I find now that there is a real argument that I have to settle, and I didn't adequately settle it in my memorandum.

So how much time do you want to write your letters? Four or five days? [30]

Mr. Haas: You would want to begin, wouldn't you?

The Court: Is five days enough?

Mr. Haas: Five days is plenty.

The Court: Fine, then. I will just take these findings under advisement. Once we conclude this point, then you can propose the revised findings and the revised judgment, if necessary.

Mr. Haas: Very well. Thank you. [31]

[Endorsed]: Filed July 5, 1957.

[Endorsed]: No. 15619. United States Court of Appeals for the Ninth Circuit. John Hancock Mutual Life Insurance Company, a corporation, Appellant, vs. Mary Troutfelt Cohen, Appellee, and Mary Troutfelt Cohen, Appellant, vs. John Hancock Mutual Life Insurance Company, a corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed: July 9, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 15619

JOHN HANCOCK MUTUAL LIFE INSUR-
ANCE COMPANY, a corporation,
Appellant and Cross-Appellee,

vs.

MARY TROUTFELT COHEN,
Appellee and Cross-Appellant.

DESIGNATION OF RECORD AND DESIGNA-
TION OF POINTS TO BE RELIED UPON

Appellant John Hancock Mutual Life Insurance Company designates for inclusion in the record on

appeal to the United States Court of Appeals for the Ninth Circuit taken by notice of appeal filed on March 27, 1957, the entire record of all proceedings and evidence in this action.

Appellant above named states that the points on which it intends to rely on the appeals in this action are as follows:

1. The trial court erred in finding that by the terms of the contract between this appellant and the insured the said insured was to pay premiums for 15 years from the effective date thereof.

2. The trial court erred in finding that by the terms of said contract this appellant agreed to make monthly payments of \$50.00 per month to plaintiff for a period extending to and including February 1, 1959.

3. The trial court erred in finding that the said insured did not know nor suspect, nor reasonably could or should have known or suspected any mistake in writing the premium payment term in the supplementary provision for family income as 15 (instead of 10) years, or in writing the income payment period therein as 20 (instead of 15) years, and in finding that such a mistake was the unilateral mistake of defendant alone.

4. The trial court erred in finding that in the exercise of ordinary care or reasonable diligence, this appellant could have discovered its alleged mistake in 1939, or in 1945.

5. The trial court erred in finding that this appel-

lant discovered its alleged mistake in 1939 or at the latest on July 26, 1945.

6. The trial court erred in finding and concluding that this appellant committed an anticipatory breach of the said contract on or about May 13, 1954.

7. The trial court erred in awarding judgment to respondent in the sum of \$8,000.00, together with interest at 7% per annum until the date of entry of judgment on installments of \$50.00 dating from March 1, 1954.

8. The trial court did not err in failing to award to respondent damages on account of this appellant's alleged breach of the following alleged warranty:

“It is not necessary to employ any firm or person to collect the proceeds of this policy.”

Dated: July 8, 1957.

HENRY C. CLAUSEN,
HENRY C. CLAUSEN, Jr.,
KEESLING & KEESLING,
WILLIAM H. KEESLING,

/s/ By HENRY C. CLAUSEN,
Attorneys for Appellant and Cross-
Appellee.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 9, 1957. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINT ON WHICH PLAINTIFF AND CROSS-APPELLANT WILL RELY

Pursuant to Rule 17(b) of the rules of this Court, plaintiff and cross-appellant Mary Troutfelt Cohen states that the point on which she intends to rely upon her cross-appeal is that the trial court erred in failing to award to her any damages on account of breach, by defendant-appellant John Hancock Mutual Life Insurance Company, of its written warranty that:

“It is not necessary to employ any firm or person to collect the proceeds of this policy.”

/s/ MOSES LASKY,
/s/ RICHARD HAAS,
BROBECK, PHLEGER &
HARRISON,

Attorneys for plaintiff-cross-appellant Mary Troutfelt Cohen.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 16, 1957. Paul P. O'Brien, Clerk.

No. 15623

United States
Court of Appeals
FOR THE NINTH CIRCUIT

FRANCIS J. HILDERBRAND,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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THE BALLARD NEWS, SEATTLE, WASHINGTON — 6/5/58 — 45 COPIES

FILED

JUN 10 1958

United States
Court of Appeals
FOR THE NINTH CIRCUIT

FRANCIS J. HILDERBRAND,
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v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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HONORABLE JOHN C. BOWEN, *Judge*

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United States
Court of Appeals
FOR THE NINTH CIRCUIT

FRANCIS J. HILDERBRAND,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

JURISDICTION

Appellee accepts appellant's statement of jurisdiction.

RESTATEMENT OF FACTS

The appellant, Francis J. Hilderbrand, was indicted for violation of Title 18 U.S.C. § 1111. He was

charged with the murder of one Robert J. Kelly, on June 15, 1952, at or near St. Joseph's Church, *on the Slater Road*, in the Northern Division of the Western District of Washington, and *on lands* acquired for the use of the United States, and *under the exclusive jurisdiction of the United States*, to-wit, *within the Lummi Indian Reservation* (R. 1, 2). (Italics supplied.)

For the fourth time, the defendant appeals from an order denying his motion to vacate the sentence and commitment entered on August 16, 1952, upon a plea of guilty to the indictment, while represented by counsel and voluntarily made, with full understanding of the nature of the charge (R. 23, 15).

No appeals from the preceding orders denying his petition to vacate were ever perfected. For the first time, after six years of incarceration, the appellant questions the jurisdiction of the court. He was fully represented by experienced and competent counsel in each of his previous endeavors to vacate the sentence and commitment.

The appeal is predicated *upon a question of fact*, to-wit, whether or not the crime committed was "on the Slater Road, . . . *on lands* acquired for the use of the United States, and *under the exclusive jurisdiction of the United States*, to-wit, *within the Lummi Indian Reservation*."

The appellant, in effect, contends that the indictment was defective and did not allege jurisdictional facts.

The appellant nowhere denies that he committed the crime of which here charged; but, for the first time, questions the jurisdiction of the court to try him for the offense; contending that since his plea of guilty, and since his incarceration, he has learned of facts which *might* deprive the federal court of jurisdiction over him.

SUMMARY OF ARGUMENT

The appellant, having plead guilty to the indictment, admitted as true all of the facts therein alleged. The effect of his plea of guilty was to waive, except in very unusual circumstances, all jurisdictional defects. The circumstances of the instant case are not so unusual as to warrant the disturbing of a conviction of guilty.

The judgment of the court carries with it a presumption of regularity. There is nothing whatsoever, in the record before this court on appeal, that could, in any way, indicate that the court lacked jurisdiction to try the accused for the murder of another man on an Indian Reservation. The accused may not, six years following incarceration, collaterally attack

the judgment of the court and try to introduce new facts, which might have influenced the jurisdiction of the court over the crime.

The offense committed was a crime against the United States. The crime was committed within the limits of an Indian Reservation created by Treaty. At the time of the admission of the State of Washington, into the Union, jurisdiction over Indian lands was reserved in the Congress of the United States. The territory occupied by the Lummi Indian reservation, not having been alienated by the United States, remains within the "sole and exclusive" jurisdiction of the United States and the state of Washington has absolutely no jurisdiction over such crimes when committed within the limits of the reservation.

The District Court having jurisdiction over the defendant, properly sentenced him upon the plea of guilty to the indictment.

ARGUMENT

The appellant makes three specifications of error which will now be considered, individually, in the order in which they are presented in appellant's brief.

SPECIFICATION OF ERROR No. 1. The United States District Court did not have jurisdiction over appellant because the indictment failed to allege and

the prosecution failed to establish an element essential to Federal jurisdiction, to-wit, that the crime of murder was committed by or against an Indian ward of the United States.

The Indictment Was Not Defective. If the Indictment Was Defective, Any Defect Was Waived by the Appellant Upon His Plea of Guilty.

A brief consideration of existing law will make it appear conclusively that the indictment was in no way defective and that even if it were defective in any way, such defect was waived by the appellant.

Throughout the discussion of this case it must be borne in mind that the defendant "pleaded guilty" to the offense charged in the indictment; that a trial of the issues was thereby avoided; that certain consequences which cannot be overlooked flow from the action of the appellant. This is not a case in which the jurisdictional facts were tested by a trial on the merits but rest upon an admission of those facts upon a plea of guilty.

If voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defense *known and unknown*. *Edward v. United States*, C.A. D.C., May 9, 1958, 26 L.W. 2575. (Motion under

Title 28 U.S.C. § 2255, claiming inadequate representation by counsel.)

There seems to be little doubt that the plea of guilty in the present case was voluntary. It may be that counsel for the defendant and the defendant himself were then unaware of certain technical defenses which might very well have made the prosecutor's job more difficult if not impossible were he put to the proof, but an awareness of facts which might have changed the picture had they been known to the defendant at the time of his plea comes too late after he elected to throw himself at the mercy of the court upon a plea to second degree murder rather than to risk his life and stand trial on a charge of murder in the first degree.

Upon considering the merits of this appeal — from a denial of the appellant's *fourth* motion under Title 28, U.S.C. § 2255 — one should not lose sight of the fact that nowhere in the records of this case does the appellant assert that he is an innocent man wrongfully convicted. Nowhere does he assert that he did not deliberately kill a fellow human being on June 15, 1952. He pleads, too late, that unknown to him, he *might have been able* to establish that no court had jurisdiction over him and therefore perhaps defeat justice. His chief concern seems to be that he received

thirty-five years rather than an admonition by the court.

A motion under Section 2255, based upon an allegedly defective indictment, may not be used as a collateral attack on a sentence. *United States v. Foster*, 7 Cir. 1958, 253 F. 2d 457.

The nature and function of 28 U.S.C. § 2255, is succinctly set forth in a very able discussion of the history and purpose of the act in the case of *United States v. Edwards*, D.C. D.C. 1957, 152 F. Supp. 179, wherein Judge Holtzoff observes:

“It is clear that it was not the intention of the Congress in enacting 28 U.S.C. § 2255, to provide an additional or a supplemental review of convictions in criminal cases. The aim of the legislation was solely to afford a remedy for extraordinary and exceptional situations which previously had been accorded by a writ of *habeas corpus*. The new remedy may not be used to correct errors occurring during the trial even if they relate to constitutional rights.

“*The moving party on a motion under Section 2255 undertakes a heavy burden to overcome the regularity of the conviction. This is especially true when the attack comes a long time after the event. The motion must present detailed facts and not merely conclusions of law or fact. Moreover, statements contained in such a motion, if contradicted by the files or records of the court, need not be taken as true.*” (Italics supplied.)

The *Edwards* case involved a motion to vacate based upon a contention that the defendant had been

illegally arrested and an unlawful search and seizure made; that there were irregularities in the proceedings before the United States Commissioner following his arrest; and that he had been mentally incompetent at the hearing before the Commissioner. It was held that defendant was entitled to no relief.

Judicial decisions, made in open court, as a result of due process, should not be lightly vacated. *United States v. Calp*, D.C. Md. 1949, 83 F. Supp. 152, 156.

Criticism of the wording of an indictment is a matter to be tested by appeal, and not by a motion to vacate a judgment. *Dunn v. United States*, 6 Cir. 1956, 234 F. 2d 219, certiorari denied 352 U.S. 899, 1 L.Ed. 2d 90, 77 S.Ct. 140; *United States v. Nickerson*, 7 Cir. 1954, 211 F. 2d 909; *Smith v. United States*, 10 Cir. 1953, 205 F. 2d 768.

Presumption of Regularity and Burden of Proof.

When collaterally attacked, the judgment of the court carries with it a presumption of regularity. The burden of proof is upon the petitioner to establish his claim by a preponderance of the evidence. *United States v. Morgan*, 1954, 346 U.S. 502, 512, 98 L.Ed. 248, 74 S.Ct. 247.

Unless the want of jurisdiction, as to subject matter or parties, appears in some proper form, every intendment must be made in support of the judgment

of a court of that character. *Ex Parte Cuddy*, 1889 131 U.S. 280, 33 L.Ed. 154, 9 S.Ct. 703; *Ex Parte O'Neal*, C.C. N.D. Fla., 1903, 125 Fed. 967, 969.

An indictment, the sufficiency of which is not questioned on the trial, will not be held insufficient on a motion to vacate the judgment entered thereon unless it is so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had. *Aaron v. United States*, 4 Cir. 1951, 188 F. 2d 446, 447, certiorari denied 341 U.S. 954, 95 L.Ed. 1376, 71 S.Ct. 1006; *Klein v. United States*, 7 Cir. 1953, 204 F. 2d 513.

Appellant here seeks by his motion to retry the case on the facts and to raise questions of law which he could have raised on a demurrer to the indictment or on an appeal from his conviction. This he cannot do. *Hilliard v. United States*, 4 Cir. 1950, 185 F. 2d 454; *Klein v. United States*, *supra*.

Where a motion is made by a prisoner to vacate a judgment seeking relief similar to previous proceedings, it is within the sound discretion of the district court to refuse to consider it, *notwithstanding that it might have been based on new grounds not included in previous motions*. *Dunn v. United States*, *supra*; *Moss v. United States*, 10 Cir. 1949, 177 F. 2d 438, certiorari denied 339 U.S. 922, 94 L.Ed. 1345, 70 S.Ct. 610;

Bickford v. United States, 9 Cir., 1953, 206 F. 2d 395.

In the latter case this Court observed:

“This is his third motion on substantially the same grounds.

“Section 2255 provides: ‘The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner’.”

In some instances, the prior refusal to discharge the prisoner may justify the denial or dismissal of the second or subsequent applications. *United States ex rel. Bowen v. Johnston*, D.C. N.D. Cal. 1944, 58 F. Supp. 208 (affirmed without opinion 9 Cir. 1944, 146 F. 2d 268; (certiorari denied 324 U.S. 876, 89 L.Ed. 1428, 65 S.Ct. 1012); *Knight v. People*, D.C. N.D. Cal. 1945, 60 F. Supp. 164 (appeal dismissed 9 Cir. 1945, 151 F. 2d 534).

Question of Jurisdiction of Court Should Be Raised at Trial and Not By Motion to Set Aside Judgment and Sentence.

If there was any question as to whether the crime was committed within the jurisdiction of the court, this should have been raised upon trial and decided there. In the absence of *exceptional* circumstances, it may not be raised by motion under Title 28 U.S.C. § 2255, which is available only where the sentence is void or otherwise subject to collateral attack. *Mark-*

ham v. United States, 4 Cir. 1954, 215 F. 2d 56, certiorari denied 348 U.S. 939, 99 L.Ed. 735, 75 S.Ct. 360. This case held that on an appeal from an order denying a motion under this section, appellant, who was represented by counsel, having been convicted of murder committed on the Old Army Base in Norfolk, Virginia (Government property which was transferred by the Army to the Navy in 1928 and later transferred from the jurisdiction of the Navy to that of the Maritime Commission), — no question being raised on the trial as to the jurisdiction of the court to punish the crime, — could not raise, by collateral attack, the issue of fact giving the court jurisdiction.

If the petitioner desires to raise them, questions involving errors either of law or of fact, must be raised by timely appeal from the sentence. *Taylor v. United States*, 4 Cir. 1949, 177 F. 2d 194.

Appellee does not agree with the view of appellant that “It is quite clear that state courts and not federal courts have jurisdiction where a non-Indian murders a non-Indian within the confines of an Indian reservation.” (Appellant’s Brief, p. 5) A full discussion of the jurisdiction of the court in cases involving both Indians and non-Indians is set forth in appellee’s discussion of the appellant’s second assignment of error.

The indictment, on its face, alleges that a crime

has been committed in violation of the provisions of Title 18 U.S.C. § 1111 and that defendant committed it. It is sufficient if the crime is charged substantially in the language of the statute. The indictment is good if it states facts sufficient to inform the defendant of the offense. Under Rule 7 of the Federal Rules of Criminal Procedure it is only necessary to charge the offense in the language of the statute so as to put a defendant on notice of the accusation against him. *Lynch v. United States*, 5 Cir. 1951, 189 F. 2d 476, certiorari denied 342 U.S. 831, 96 L.Ed. 629, 72 S.Ct. 50.

In *Hagner v. United States*, 285 U.S. 427, 431, 76 L.Ed. 861, 52 S.Ct. 417, it is said:

“The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and ‘sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.’ (Citing cases.)”

Appellant contends that if permitted he *may* be able to establish that neither he nor his victim was an

Indian and that the crime was not committed on land within the exclusive jurisdiction of the United States. However, it must be remembered that in the simple language of the indictment, the crime in question was committed not in, or on land belonging to St. Joseph's Church, and not on land *outside* the limits of the Lummi Indian Reservation, but rather was committed "on the Slater Road, . . . on land acquired for the use of the United States, and under the exclusive jurisdiction of the United States, to-wit, *within the Lummi Indian Reservation.*"

Upon proper grammatical construction, the phrase "at or near St. Joseph's Church" modifies the phrase "on the Slater Road", and not vice versa. Thus, the crime to which appellant pleaded guilty, and thereby admitted the facts alleged in the indictment, was committed "on lands acquired for the use of the United States, and under the exclusive jurisdiction of the United States," within the purview of Title 18 U.S.C. § 7 (3) extending the territorial jurisdiction of the United States to "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof," and on land defined as "Indian country" as set forth in Title 18 U.S.C. § 1151.

Whether the appellant was an Indian or a non-

Indian, enrolled or emancipated, made no difference since he came under the jurisdiction of the district court in any event.

Whether the crime was committed on fee land or on the Slater Road makes no difference now because he has admitted the jurisdictional fact by his plea of guilty.

Whether there might have been any defect in the indictment makes no difference because he has cured any defect by his admission of guilt and failure to demur to the indictment. Had he demurred, any defect would have been remedied by a new indictment. Had he stood trial, he might not have been present today to question the validity of the indictment.

SPECIFICATION OF ERROR No. 2: The crime of which appellant was convicted was not within the jurisdiction of the United States District Court because it was not committed on lands under the exclusive jurisdiction of the United States.

Whether the victim was killed on land under the exclusive jurisdiction of the United States is a question of fact determined, once and for all, by the plea of the defendant. There is nothing in the record before the court to establish that the crime was committed on private land owned by the Catholic Church.

Even though the victim may have been assaulted on fee land, it is apparent from the face of the indictment that the victim was killed within the limits of the Lummi Indian Reservation; consequently, the question resolves itself to the issue of whether or not the district court has jurisdiction to try a non-Indian for a crime committed within the limits of an Indian reservation.

The crime of which the appellant was convicted was within the jurisdiction of the United States District Court whether the defendant was an emancipated Indian or a person other than an Indian.

Since the crime charged was not one of the offenses enumerated in Title 18, U.S.C. §§ 1152, 1153, and 3242, no discussion will be made as to what the jurisdiction of the court would have been had the indictment charged an offense by an Indian against another Indian or any crime involving an enrolled Indian.

Jurisdiction, if any, rests on the charge in the indictment, to-wit, a violation of Title 18 U.S.C. § 1111, with its corollary sections, 7, and 1151, 3231, of Title 18.

In considering whether or not the United States has jurisdiction over a crime committed on land within a reservation or upon land that originally constituted a part or parcel of a reservation but has been

patented, consideration must be given to the following factors, all of which play their own peculiar role in the over-all picture:

1. Was the state one of the original states?

2. Was the state originally a territory and created by an enabling act? What are the terms of the enabling act?

3. Were the reservations created by a treaty with the Indians before or after the state came into the Union?

4. What reservations, if any, as to jurisdiction of the United States were contained in the treaty, enabling act constitution?

5. Did the United States by special act of Congress deprive itself of jurisdiction over a particular reservation?

6. If the crime was committed on allotted land, did the patent issue under the terms of the General Allotment Act or under a particular treaty?

7. Were either of the parties enrolled Indians?

General jurisdiction of the district court is conferred by Title 18 U.S.C. § 3231:

“The district courts of the United States shall

have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”

Murder is declared to be a crime against the United States by Title 18 U.S.C. § 1111:

“(a) Murder is the unlawful killing of a human being with malice aforethought. Every . . . deliberate, malicious, and premeditated killing . . . is murder in the first degree.

“Any other murder is murder in the second degree.

“(b) Within the special maritime and territorial jurisdiction of the United States,

“Whoever is guilt of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto ‘without capital punishment,’ in which event he shall be sentenced to imprisonment for life;

“Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.”

The special maritime and territorial jurisdiction of the United States is defined in Title 18 U.S.C. § 7 as

“(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof”

The general laws of the United States are extended to the Indian country by Title 18 U.S.C. § 1152, which provides:

“Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.”

Indian country is defined in Title 18 U.S.C. § 1151 as

“ . . . (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, *notwithstanding the issuance of any patent*, and including rights-of-way running through the reservation”

(Italics supplied.)

The Lummi Indian Reservation was created by the Point Elliott Treaty of January 22, 1855 (12 Stat. 927), Article II, providing, in part, as follows:

“There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz (here follows the area reserved)”

It provides that lots may be assigned to individuals under Article VII thereof,

“The President may hereafter . . . cause the whole or any portion of the lands *hereby reserved* . . . to be surveyed into lots, and assign the same to individuals or families . . . subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same way be applicable”

The applicable provisions of the Treaty with the

Omahas, 1854, 10 Stat. 1043, of March 16, states:

“... conditioned that the tract shall not be aliened or leased for a longer term than two years . . . until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. . . . No State legislature shall remove the restriction herein provided for, without the consent of Congress.”

The Enabling Act under which the State of Washington was created, 25 Stat. 676, provides in part as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

* * * * *

“Sec. 4. Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and *said Indian lands shall remain under the absolute jurisdiction and control*

of the Congress of the United States; . . .” (Italics supplied.)

The Constitution of the State of Washington provides:

“ARTICLE XXVI
“COMPACT WITH THE UNITED STATES

“The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

* * * * *

“Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits *owned or held by any Indian or Indian tribes*; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. . . .”* (Italics supplied)

That the State of Washington was never granted jurisdiction over Indian reservations existing at the time of the enactment of the Enabling Act was further made manifest by Article XXVI of the Constitution of the State of Washington, *supra*, ratified by the people at an election held on October 1, 1889, at which time the very words of the Enabling Act itself were adopted by the people,

“ . . . and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States ”

It would be difficult to find more explicit language to establish the jurisdiction of the courts of the United States over crimes committed on Indian reservations than this language contained in both the Enabling Act and the Constitution of the people of the State of Washington. Despite an extensive search, appellee has not been able to find any Congressional legislation since 1889 abrogating the powers reserved to the Congress of the United States over Indian lands in the State of Washington.

The Lummi Indian Reservation constituted such Indian lands, having been created by the Treaty of Point Elliott January 22, 1855 (12 Stat. 927). Other than an occasional allotment to Indians provided for in the Treaty, the Reservation is still intact.

The case closest in point is the case of *Brown v. United States*, 8 Cir. 1906, 146 Fed. 975, involving a writ of error to the Supreme Court of the Territory of Oklahoma. Judgment of conviction was affirmed. In the *Brown* case, the plaintiffs in error were convicted in the district court of Pawnee County, while this court was exercising the jurisdiction of the circuit and district courts of the United States, of the larceny of a horse in the Osage Indian Reservation, which is within

that territory and was attached to Pawnee County for judicial purposes. The issue was whether larceny committed in an Indian reservation in the Territory, by one not an Indian, was a crime against the laws of the United States and cognizable by the district court of the territory while exercising the jurisdiction vested in the Circuit and District courts of the United States. The defense presented was that the crime was an offense against the laws of the Territory and not against the laws of the United States. The Court discusses the application of the general statutes of the United States heretofore cited as supporting the basis for the jurisdiction of the District Court in the instant case, the Court holding at page 977:

“... the offense of which the plaintiffs in error were convicted was one against the laws of the United States and therefore was properly cognizable on the federal side of the district court.”

The Court in its discussion, at page 977, distinguishes the *McBratney* and *Draper* cases as follows:

“... they relate to crimes committed in a sovereign state the admission of which into the Union, *without any exception with respect to the Indian reservations therein or the jurisdiction over them*, removed those reservations from the plenary authority of the United States by reason of the constitutional rule of equality in respect of statehood.” (Italics supplied)

The next case in point is that of *Ex Parte Wilson*, 1891, 140 U.S. 575, 35 L.Ed. 513, 11 S.Ct. 870, holding that the district courts of a territory sitting as a court of the United States had jurisdiction over the crime of murder *committed by a person other than an Indian* upon an Indian reservation within its territorial limits. This case was heard by the Supreme Court of the United States upon a petition for a writ of habeas corpus denying the validity of a sentence of death made by the District Court of the Second Judicial District of the Territory of Arizona, for the crime of murder committed within the White Mountain Indian Reservation. Application denied.

The petitioner alleged that since both parties involved were Negroes, the territorial court, sitting as a court of the United States, did not have jurisdiction over him. Unlike the instant case, the White Mountain Indian Reservation had not been constituted at the time Arizona was organized but was created by order of the President in 1871. By Act of Congress of February 14, 1887 (24 Stat. 388), the creation of the Reservation by the President was confirmed by legislative recognition. The court ruled that since Section 2145 of the Revised Statutes extends to the Indian country the general laws of the United States, as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United

States, except as to crimes the punishment of which is otherwise expressly provided for, the Indian reservation being considered a part of the Indian country, the words "sole and exclusive" as used in the Act describe the laws which are extended to the Indian country [further extended by Section 1151 to "within the limits of any Indian reservation" to avoid conflicts which arose].

The Wilson case was approved in *In re Ingram*, 1902, 12 Okla. 54, 55, 69 Pac. 868, 869, and *Goodson v. United States*, 1898, 7 Okla. 117, 123, 54 Pac. 423, 425, both holding Osage Indian Reservation to be in Indian country.

Most of the cases cited in Rose's Notes involves the situation where one of the parties, either the accused or the victim, was an enrolled Indian and would fall under the application of another statute. However, it should be noted here that had the instant case gone to trial and had the facts established that the accused was an Indian, the indictment, regardless of the terminology used therein, would have been sufficient to charge a crime under Title 18 U.S.C. §§ 1153 and 3242, as well, and the cases cited, i.e., *United States v. Pelican*, 1914, 232 U.S., 442, 445, 58 L.Ed. 676, 677, 34 S.Ct. 396; *Donnelly v. United States*, 1913, 228 U.S.

243, 256, 57 L.Ed. 820, 826, 33 S.Ct. 449, etc., would have been applicable.

Since the *Wilson* case was heard by the highest court of the land, the principles of law established therein are binding upon all courts. The Supreme Court has not seen fit to reverse its ruling. Unless there is something in the Enabling Act under which Washington became a state, contrary to the legal principles announced therein, the law is still binding upon the facts of the instant case.

The Enabling Act under which the State of Washington was created, page 19, *supra*, has never been repealed and has only once been amended. Section 11, referring to school lands, was amended by the Congress in 47 Stat. 150; however, the proviso set forth in Section 4, Second Article,

“ . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States ”

has never been changed since its creation in 1889.

Appellant relies quite heavily on the case of *New York ex rel. Ray v. Martin*, 1945, 326 U.S. 496. This case involves the question of federal jurisdiction over a crime committed within the city of Salamanca, a city of 9,000 population, situated within the limits of the Allegany Reservation, the city having only eight

Indian families. The court ruled that the case fell within the rule announced in the case of *United States v. McBratney*, 104 U.S. 621; however, it must be remembered that the State of New York was one of the original thirteen states and in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. With that rule we have no quarrel.

No enabling legislation reserved jurisdiction in the Indian lands to the United States. No constitutional provision by the people of New York reserved jurisdiction over such lands "to the control of the Congress of the United States." In fact, Congress had by virtue of Section 7 of the Act of 1875, 18 Stat. 330 granted specific jurisdiction over the village of Salamanca to the State of New York.

United States v. McBratney, 1882, 104 U.S. 621, 26 L.Ed. 869, was heard by the Supreme Court upon a certificate of division of opinion from the Circuit Court of the United States. This case is likewise distinguishable from the instant case because of the following language of the Court found at pages 623-624:

"If this provision of the 1st section [of the Act of Congress of February 28, 1861] had remained in force after Colorado became a State, this indictment might doubtless, have been maintained

in the Circuit Court of the United States. (Citing cases.)

“But the Act of Congress of March 3, 1875, for the admission of Colorado into the Union . . . contains no exception of the Ute Reservation or of jurisdiction over it. 185 Stat. at L. 474. . . .

“The Act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing Treaty which are clearly inconsistent therewith. . . . The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, *without any such exception* as had been made in the Treaty with the Ute Indians and in the Act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States.” (Italics supplied.)

The case of *Draper v. United States*, 1896, 164 U.S. 240, 41 L.Ed. 419, 17 S.Ct. 107, and similar cases are not in point because they relate to crimes committed in a sovereign state, the admission of which when made without any exception with respect to the Indian reservations therein or the jurisdiction over them — removed those reservations from the plenary authority of the United States by reason of the constitutional rule of equality in respect of statehood. *Brown v. United States*, 8 Cir. 1906, 146 Fed. 975.

The case of *State v. Howard*, 1903, 33 Wash. 250,

74 Pac. 382, on first examination, would appear to support the proposition of the appellant that the State of Washington has jurisdiction over a crime committed upon an Indian reservation by either an emancipated Indian or a person other than an enrolled tribal Indian; however, an examination of the case shows that, as sometimes happens, the court's discussion goes beyond the scope of the matters under consideration. The crime involved in that case was committed by a member of the Puyallup Tribe of Indians. The crime was committed in Pierce County, Washington, the area in which the Puyallup Reservation was located. To put the case, and its holdings, in the proper perspective, it is necessary to examine the holding of the court in the case of *State v. Smokalem*, 1905, 37 Wash. 91, 79 Pac. 603, a later case, wherein it is observed at pages 93 - 94:

"In 1883 or 1884 the lands of this reservation were *allotted to the Indians in severalty*, except a small parcel, which is still retained by the government and used for school purposes. On March 3, 1903, *all restrictions against the alienation* of these allotted lands by the Indians were removed, and the allotted lands are now held by the Indians by the same tenure, and with the same right of alienation, as are the lands of all other citizens of the state. For at least five years prior to the commission of this offense, the Indians residing on this reservation maintained no tribal relations, had no chiefs or head men, maintained no form of Indian government, and had neither laws nor cus-

toms . . . The Indians are qualified electors of the state, and all their differences are submitted to the courts of the state for adjudication and decision, having no courts of their own. There is no agency at the reservation, and the federal government assumes no jurisdiction whatever over the Indians, except in the simple matter of maintaining the school above referred to."

Under the special situation of the Puyallup Indians it would appear the United States had almost entirely relinquished jurisdiction over the Puyallup Reservation. These two cases can thus be distinguished because the reservation in question, to-wit, the Puyallup Indian Reservation, was not an Indian reservation of the same type as the Lummi Indian Reservation, since all of the lands, except a small strip along the Puyallup River had been alienated.

It is submitted that the attention of the Supreme Court of the State of Washington was not invited to the reservation of jurisdiction by the United States as expressed in the Enabling Act and in the Constitution of the State of Washington; nor was the attention of the court invited to the case of *Ex Parte Wilson*, *supra*. Not having considered these matters, the court fell into error. It further appears that the crimes involved in the *Howard* and *Smokalem* cases occurred on allotted lands, and were heard prior to the amendment of Title 18, U.S.C. 1151.

Much confusion existed prior to the amendment of Title 18 U.S.C. § 1151. This confusion was, however, resolved by the use of the words "(a) all lands within the limits of any Indian reservation of the United States government, notwithstanding the issuance of any patent, . . ."

SPECIFICATION OF ERROR No. 3: This case should be remanded to the United States District Court for the Western District of Washington, Northern Division, and appellant should be permitted to amend his motion in order to allege additional facts supporting his contention that the crime of which he was convicted was not within the jurisdiction of a United States District Court.

Since the appellant's third specification of error is dependent upon the validity of his first and second specifications of error, and actually constitutes merely a prayer for relief, no discussion will be made of the third specification of error, other than to observe that appellant seeks to close the barn door after the horse has been stolen. He now seeks an opportunity to present facts which should have been presented by a demurrer to the indictment or at a trial on the merits. There is no showing of newly discovered evidence which would establish his innocence nor of any facts which would indicate that justice has gone awry. It is merely a claim based on speculation and conjecture.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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No. 15624

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN E. BRADFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

JUL 25 1958

PAUL P. O'BRIEN, CLERK

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No. 15624
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN E. BRADFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

On December 19, 1956 an indictment was filed against appellant in which the Grand Jury for the Southern District of California charged him in two counts with violations of Section 174 of Title 21, U. S. C. Count One charged him, in effect, with unlawfully selling and facilitating the sale on August 28, 1956 of approximately 350 grains of heroin which, as the defendant then and there well knew, had been imported into the United States contrary to law. Count Two charged a similar offense with respect to August 31, 1956 and 325 grains of heroin.

The District Court had jurisdiction of the cause under Section 3231 of Title 28, U. S. C., which confers on all District Courts original jurisdiction "of all offenses against the laws of the United States."

The trial of the above matter commenced on March 28, 1957 before the Honorable Ernest A. Tolin, judge presiding. On April 10, 1957 the jury returned a verdict of guilty as charged in each of the two counts. On April 26, 1957, the defendant was sentenced to the custody of the Attorney General on Count One for fifteen years and on Count Two for fifteen years, the terms to run consecutively for a total of 30 years.

On or about May 2, 1957, a Notice of Appeal to this Honorable Court was filed. Thereafter an order was signed permitting the appeal to proceed *in forma pauperis*. The appeal was docketed and Appellant's Opening Brief filed.

Jurisdiction of this Court stems from Section 1291 of Title 28, U. S. C.

II.

The Statute Under Which Appellant Is Being Prosecuted.

The indictment in this case was brought under Section 174 of Title 21, U. S. C. which provides as follows:

“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. * * *

“Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

III.

Statement of the Case.

The sequence of events in this case with respect to those matters pertinent to the issues on appeal is as follows:

On Thursday, March 28, 1957, the jury was selected and the case commenced before the Honorable Ernest A. Tolin, Judge Presiding. [Rep. Tr. 3.] Government counsel made an opening statement [Rep. Tr. 3-8] and, upon its conclusion, appellant moved to dismiss the indictment. [Rep. Tr. 8, 9.] The motion was denied and appellant then moved for an acquittal on the basis of the government's opening statement. This motion was also denied by the Court. [Rep. Tr. 9, 10.] The government then called its first witness.

The direct testimony of William R. Farrington, a federal narcotic agent, was interrupted by examination of the government's second witness, chemist George B. Crane. [Rep. Tr. 38-71.] On Friday, March 29, 1957, the direct examination of William R. Farrington was continued. [Rep. Tr. 74-98.] Cross-examination was undertaken by defense counsel and finished on the same day. [Rep. Tr. 98-157.] The next government witness was Malcolm P. Richards, also an agent of the Federal Bureau of Narcotics. His testimony was finished on March 29, 1957. [Rep. Tr. 158-181.] Bernard G. Corbitt, likewise a federal narcotics agent, then took the stand for the government and his examination was terminated on said date.

[Rep. Tr. 181-193]. The next government witness was Algy Landry, a Deputy Sheriff of Los Angeles County assigned to the Narcotic Detail. [Rep. Tr. 193-200.] Dorothy A. Smith, also a Deputy Sheriff on said Narcotic Detail, took the stand for the government and testified on the same date. [Rep. Tr. 201-206.] The government rested its case on March 29, 1957. [Rep. Tr. 207.]

The case was adjourned to Tuesday, April 2, 1957. On that date appellant moved for a judgment of acquittal. The motion was denied. [Rep. Tr. 214-227.] The trial was continued to April 9, 1957 when appellant's case and government's rebuttal were presented. Appellant John E. Bradford took the stand. [Rep. Tr. 254-320.] Edward A. Carusi, a graduate student at UCLA, majoring in physiology and a research assistant there, also testified for appellant. [Rep. Tr. 321-341.] His other three witnesses, Wendell J. Snyder, Kenneth E. Irving and Fred George Fimbres, local law enforcement officers, then testified. [Rep. Tr. 350-358.] The government thereafter called its rebuttal witness Howard Chappel, agent in charge of the Federal Bureau of Narcotics of Los Angeles. [Rep. Tr. 359-372.]

Opening argument by the government was made. [Rep. Tr. 376-388.] Argument was made on behalf of appellant [Rep. Tr. 388-405] and the government's closing argument was concluded. [Rep. Tr. 406-412.] An objection to argument of the government was made by defense counsel but overruled by the Court. Also appellant renewed his motion for judgment of acquittal which was denied. [Rep. Tr. 414.]

On Wednesday, April 10, 1957, the jury was instructed by Judge Tolin. Exceptions to the charge to the jury were taken by the Court immediately thereafter and further instructions given. [Rep. Tr. 419-439.] The verdict in the case was received by the Court from the jury

on April 10, 1957. [Rep. Tr. 441.] On April 24, 1957, appellant argued a written motion for new trial and a written motion for judgment of acquittal. [Rep. Tr. 464.] Both motions were denied by the Court after extensive argument was heard. [Rep. Tr. 466.] On the same day, April 26, 1957, the Court, after reviewing appellant's record, sentenced him.

IV.

Statement of the Facts.

Since a statement of facts in Appellant's Opening Brief is set forth in considerable detail and covers approximately 35 pages in length, the government feels that a fairly short narrative of the facts, stressing the various matters which are particularly involved in the questions raised by appellant, would be helpful to the Court.

The first important transaction in connection with the sale of narcotics to Agent Farrington took place on August 28, 1956. However, the agent testified that he had spoken to appellant on the 27th of August, 1956 [Rep. Tr. 100] and told the latter that he, the agent, wished to do some business with him. Appellant replied that he didn't wish to talk on the telephone and would call and meet the agent the next day. Farrington testified that he had gotten appellant's telephone number from one "Bobby Hawkins". [Rep. Tr. 116.]

Appellant testified that he met the agent as "Ben Allen" at Bobby Hawkins' apartment about the 26th of August [Rep. Tr. 256] and his testimony showed, in effect, that the conversation which he claims took place there between all of the parties was no more than an introduction. [Rep. Tr. 257, 258.] This introduction was made by Mrs. Hawkins. In relating the conversation, appellant stated he asked her if he could buy two caps of heroin from her and was the "gentlemen here an all right fellow" (referring to

“Ben Allen”). All Mrs. Hawkins did was to reply in the affirmative, that the agent was a friend of her husband. [Rep. Tr. 256.] The only other conversation about narcotics was that Barbara Hawkins’ husband, Doc Hawkins, was in jail and that “he” was trying to buy some heroin from her at that time, that “they were out” and that she didn’t have any. The rest of the conversation was just “general”, an “introduction”. [Rep. Tr. 257.]

Agent Farrington testified that appellant did not call him back on the morning of the 28th of August and that he, the agent, called appellant at approximately 11:00 A.M. of that day. A man who identified himself as “John” came to the telephone and stated he had lost the agent’s number, was glad that the agent had called him. Agent Farrington again told “John” that he wanted to do some business with him, without mentioning the word narcotics. [Rep. Tr. 118, 119.] At about 1:30 of the same day appellant and agent Farrington met in front of the B & M Cafe. [Rep. Tr. 119, 120, 259.] The appellant walked over to the agent’s car and asked the latter if his name was “Ben.”

Agent Farrington testified that just prior to going into the cafe appellant walked across the street to the car, leaned in and asked him if he was “Ben”, then appellant got into the agent’s car where they both had a conversation. [Rep. Tr. 18.] This was corroborated by agent Richard’s testimony [Rep. Tr. 160], and also agent Dorothy Smith’s. [Rep. Tr. 203.] The two men then went into the cafe where they stayed for about five or ten minutes. Agent Farrington testified that before they got into the cafe, appellant stated he didn’t do any business in the Los Angeles area as there were two policemen who would love to apprehend him, naming them, and who worked out of the University Division. The appellant said it was too “hot” in Los Angeles and most of his transactions

were in San Francisco and Northern California. [Rep. Tr. 120.]

After the two men went into the cafe they had a further conversation regarding narcotics. The agent testified appellant told him the narcotics he had were of a very high quality and that he was sure the agent would be satisfied with them. Appellant further stated that he guaranteed the quality of the narcotics and the agent should not tamper with them too much; in other words, he should not "cut" them and weaken the original substance. [Rep. Tr. 18, 122.] The appellant further remarked that he didn't "tamper too much" with his narcotics, maintaining a "norm or level" and that his customers were happy with what they received from him since it was always consistent. [Rep. Tr. 123.]

Price was discussed at this meeting, appellant asking the agent how much the latter had paid in the past. Farrington told him that he had paid \$300.00 an ounce. The appellant then said he could beat that price, would let the agent have an ounce for \$275.00. During this time they were specifically discussing heroin. [Rep. Tr. 18, 19.]

Agent Farrington and appellant left the cafe after this conversation took place and got into the government vehicle which was parked outside. [Rep. Tr. 20, 128, 160, 204.] At that time agent Farrington gave the appellant \$275.00 of official advance funds. [Rep. Tr. 20, 261, 303.]

Agent Farrington testified that he gave appellant the telephone number of an undercover apartment just after they left the cafe. [Rep. Tr. 20.] Agent Farrington then proceeded back to this apartment to wait for appellant's phone call. [Rep. Tr. 21.]

About 2:30 the same day Agent Farrington received a telephone call from appellant and got instructions from

the latter to go to 29th and St. Andrews. Appellant said he was waiting at that location. He further told the agent that he, the appellant, would have to do something he did not intend to do. He said, "I will have to go to your hand with the stuff." Agent Farrington testified that a "hand to hand deal" is referred to in the narcotics trade as from one hand to another person. The agent testified that he understood from his experience in his job that the defendant meant the latter would deliver the narcotics to the agent personally. [Rep. Tr. 21, 22.]

Agent Farrington left the apartment and met appellant at 29th and St. Andrews where the latter was standing near the fender of his own vehicle. The agent parked directly behind the appellant's automobile. The latter walked to the passenger side of the agent's vehicle, leaned in and stated that the "stuff" was under his rear tire, to the rear of the right rear door, in a brown paper sack. [Rep. Tr. 131.] He instructed the agent to pick it up when he, the appellant, left. Appellant then walked away from the agent's car but returned to the vehicle where he had leaned in. He wiped it off with his sleeve, went back to his own vehicle and drove away. [Rep. Tr. 22, 23.]

When the appellant testified, he appeared to indicate that both packages of heroin had been dropped at the base of a tree. [Rep. Tr. 263, 275.] However, he did not deny in his testimony the agent's testimony as to the above events at the corner of 29th and St. Andrews wherein the agent parked directly behind the appellant's vehicle and found the narcotics at the rear of the car as indicated above.

Agent Farrington then returned directly to the undercover apartment, met his fellow officers and the heroin was marked for identification with their personal initials. This particular package purchased on the 28th of August

was made part of the Government's Exhibit No. 1 in evidence. [Rep. Tr. 29.]

Agent Farrington testified in his own opinion the price of \$275.00 for an ounce of heroin was a "fairly low price", since the normal "market price" of an ounce might run from \$300.00 to \$500.00. [Rep. Tr. 133.] Appellant testified that he had some dealings with a "Pat" in connection with obtaining heroin for "Ben". [Rep. Tr. 260-262.]

Although the appellant had previously stated he had been addicted to heroin for two or three years prior to the first transaction with the agent [Rep. Tr. 257-260], he testified that he told "Ben" that he did not know anybody who sold big quantities of heroin. [Rep. Tr. 260.] He further testified that the agent was the one who asked him if he knew a fellow named "Pat". Although he testified to the above effect, he did admit knowing a fellow named "Pat" after being asked by the agent [Rep. Tr. 260] and was able that day to make a deal, according to his claim, with "Pat" for \$270.00 worth of heroin, to wit, one ounce.

However, there was no evidence to show that anyone named "Pat" appeared on the scene in the first transaction or in the one which followed.

Agent Farrington called appellant on the 31st of August, 1956 and told the latter that he was interested in making another purchase of narcotics. Farrington said that on this telephone conversation appellant told the agent that he, appellant, had been waiting to hear from him and had wondered where the agent had been. Appellant stated that it would be all right to have another transaction with the agent and that he would meet him at the same place, 29th and St. Andrews in Los Angeles. [Rep. Tr. 31, 134.] Farrington also testified that at the time of the

telephone conversation, appellant asked Farrington how much he wanted, and the latter stated he would like as much as the last time. [Rep. Tr. 135.] On the 31st, before the agent met appellant again at 29th and St. Andrews, the former was advised by appellant that he hadn't been able to reach his "drop man" (the man who normally in the course of dealing in the narcotics traffic places the heroin at a certain location) since that man was playing golf. Later, at approximately 2:00 P.M., appellant called Agent Farrington and said that he had gotten in touch with his "man" and the meeting was set for the 29th and St. Andrews. [Rep. Tr. 32, 141.]

Appellant related how he discussed with "Ben Allen" this other purchase of heroin on the 31st of August, a few days after the first deal had been consummated. [Rep. Tr. 265.] He said that, in effect, he had complained to the agent because the latter had not given him anything for undertaking the first sale. However he agreed to do it again. [Rep. Tr. 266, 273.] Appellant testified that after talking to "Pat" on the telephone he then called "Ben" and met him over on St. Andrews again. [Rep. Tr. 267.] The two men met on the corner at that locality about 2:45 P.M., and agent Farrington gave the appellant \$275.00. The appellant told him to go to the apartment and the agent would be called by him later. The appellant did not give agent Farrington any narcotics at that time. [Rep. Tr. 33, 142, 306.]

Approximately 15 or 20 minutes later, appellant called agent Farrington and made arrangements to meet him at Washington and Westmoreland. The agent did see him at that place where he saw the appellant standing at a fire plug. There appellant entered the government's vehicle and told the agent to proceed down Westmoreland. They went to number 1741 of that street, which was the address of a large house. Appellant then pointed to a

small brown package which was at the base of a palm tree in the front yard and told the agent that the heroin was in that bag. [Rep. Tr. 34, 35, 143.] Although appellant in his testimony claims that the two of them went looking for the package together [Rep. Tr. 274, 275], the agent's testimony was that the two men proceeded to 1741 Westmoreland at the appellant's directions. [Rep. Tr. 143, 144.]

After appellant left agent Farrington's vehicle and entered his own, the agent having returned him to the spot where appellant's car had been parked previously, the agent proceeded back to 1741 Westmoreland where he waited until he was joined by agents Corbett and Richards. At that time he went over to the palm tree and got the package described by appellant. [Rep. Tr. 144, 164, 165.]

As appellant was leaving agent Farrington, after pointing out the brown package underneath the Palm tree on Westmoreland, the agent told him that he wished to purchase some "coke" (cocaine). [Rep. Tr. 307, 275, 276, 31.]

The heroin which was taken from the base of the Palm tree was part of Government's Exhibit 2. [Rep. Tr. 78.]

Since appellant was in a hurry when he was asked by agent Farrington about the "coke", appellant asked the agent to call him that night when the former got off work. The agent did call appellant later and asked him if he could procure one ounce of cocaine. [Rep. Tr. 276, 84.] This call was made on the 6th of September. The agent testified he had not called appellant during the period from August 31st to September 6th, but said he did call two or three times on that particular day after first contacting him. [Rep. Tr. 145.] Agent Farrington also testified that the appellant told him that cocaine would cost more money, probably \$400.00, and directed him to go to the area of 42nd and South Central Avenue for appellant to

get the money in advance of procuring the cocaine. Both he and the agent testified that they actually met on that corner and that the \$400.00 was given to appellant by the agent. The understanding was, according to appellant's testimony [Rep. Tr. 277, 311], that appellant was to use \$300.00 of the money to buy cocaine and keep \$100.00 for himself.

Agent Farrington saw the appellant the next day on September 7th on the street at which time the agent asked for either his money or the narcotics. [Rep. Tr. 87, 88, 147.]

At the time agent Farrington saw appellant on September 7th, the latter told him that he did not wish to "burn" the agent. Agent Farrington testified that the word "burn" is a word commonly used by persons engaged in the narcotics traffic meaning to take a person's money and abscond with it without delivering any goods. [Rep. Tr. 88, 89.] However, as appellant put in his own testimony, he "took that money and run off with it." The agent never did get the money, with the exception of \$50.00 [Rep. Tr. 92, 312, 313], or the cocaine which had been promised to him by the appellant.

The agent made several vain attempts to get his money back or to get cocaine for his payment. On one such occasion agent Farrington and another agent saw the appellant in the bar of a hotel in Los Angeles. Appellant went to his room in the same hotel, according to what he told Farrington, and brought back an address, stating that the "junk", the one ounce of heroin, was in the gutter at a certain address which was written on a piece of paper. Agents Farrington and Richards proceeded to that address but, on arrival, found that there was no such place.

Edward A. Carusi testified for the defendant as a "graduate student at UCLA in the department of zoology,

majoring in physiology” and a “research assistant” at UCLA in the field of chemistry. [Rep. Tr. 321.] He stated that morphine could be synthesized and that it had been synthesized once in 1952 at the University of Rochester, as recorded in the Journal of the American Medical Society, 1952. [Rep. Tr. 323.] After discussing the synthesization of morphine and heroin, the witness testified on cross-examination that he had never looked at exhibits 1-d and 2-d, which comprised the heroin involved in this case, and that he had never made any chemical tests on the substances. Further, he was not requested to make any by the appellant and he had not been working with morphine, opium or heroin. [Rep. Tr. 331.] Carusi had not performed any experiments that he had discussed in his direct testimony and had never synthesized morphine. He did not know of any such process as he had described being conducted in the United States. [Rep. Tr. 332.] He did not testify that any synthesization of morphine had been conducted other than the one instance at the University of Rochester.

He testified that in the one instance of synthesization of morphine he mentioned, they had started with a very complex material which he had never used or seen himself and which had never been evolved or made in a laboratory where he worked. [Rep. Tr. 334, 335.] He stated that some heroin is made in laboratories, probably in very small amounts. The channels into which morphine is directed in its commercial sale were principally what might be called medical channels for the use of physicians, dentists and veterinarians, probably going from the pharmaceutical houses to such licenced persons. He knew of no legal medicinal use for heroin, except possibly for laboratory work. [Rep. Tr. 336.] The witness knew of no laboratory in the United States which prepared heroin for the use of an opiate, as a narcotic. He was not sure how the various ingredients found in opium are extracted from

it in this country, whether or not government laboratories handled the extraction or whether it was allocated to commercial pharmaceutical houses under some sort of supervision. He stated that as far as he knew the substantial bulk of opium which is used in this country to obtain morphine for medicinal purposes is shipped into the United States. [Rep. Tr. 338, 339.]

The Government entered into a stipulation with defense counsel with respect to certain products made in the United States from lawfully imported raw opium during the years 1954, 1955 and 1956. [Rep. Tr. 348, 349.]

The appellant also called as witnesses Wendell J. Snyder, Kenneth Irving and Fred George Fimbres, all Los Angeles law enforcement officers, in connection with the subject of alleged thefts of narcotics in this vicinity. Mr. Snyder was a policeman, Commander of the Planning and Research Division of the Los Angeles City Police Department with the rank of captain. He testified that there were "some" thefts of narcotic drugs, presumably speaking only for the city of Los Angeles, but that he did not know how many. His records were not geared to give the information which was requested in this respect by defense counsel. Mr. Irving was a captain in the Los Angeles County Sheriff's Department in charge of the Sheriff's Narcotic Detail. He testified that although, during the year 1956 as head of said department he did receive reports of any thefts of narcotic drugs in the unincorporated portion of Los Angeles County, his detail did not compile any statistics reflecting the amount of any drugs that were the subject of thefts in that area during 1954, 1955 or 1956. On cross-examination he testified that any of the thefts which had been called to his attention were usually in very small amounts. Mr. Fimbres was a Deputy Sheriff for the County of Los Angeles, Chief of the Administrative Division. However, he testi-

fied that his records did not indicate whether or not thefts reported during the years 1954, 1955 or 1956 involved the taking of narcotic drugs. [Rep. Tr. 350-359.]

In rebuttal, the Government called Howard W. Chappel, agent-in-charge of the Federal Bureau of Narcotics in Los Angeles. He testified that he had charge of the control of both illicit and licit narcotic traffic, including enforcement activity and registrant control, for an area which covered approximately one-half of California, a distance between San Francisco down to the Mexican border. He stated that his office handled the "Mexican border, Nevada, in some instances works over into Arizona and New Mexico." [Rep. Tr. 360.] He further testified that his office has liaison and close contact with all of the other government narcotic agencies in the United States and works in the control of the importation of narcotic drugs. [Rep. Tr. 361.]

In describing the importation and production of crude opium throughout the world, Mr. Chappel testified that opium is brought into the United States under bond on a quota, the latter having been arrived at by the United Nations. The production of crude opium throughout the world is more or less put into a common pool and the need for narcotics by individual countries, by which a *pro rata* share would be deducted, was computed by the United Nations. He testified that the United States does not give all its trade to any one country but buys a certain amount from each nation where opium is produced legitimately under licence, including Yugoslavia, Greece and Turkey. [Rep. Tr. 361.]

Mr. Chappel went on to say that the opium for the "world marget" (including the United States) is grown primarily through the Middle East, outside of the United States. The opium brought into the United States is done so under bond and kept under bond until distributed

to the manufacturers, In connection with its distribution in this country, manufacturers are given their quota and they purchase on specific forms furnished by the government for that purpose. He stated that it is known how much of a certain by-product like codeine or morphine can be made from a given quantity of opium. The opium is closely controlled and the Bureau of Narcotics determines that no company will manufacture or use more opium than is actually needed for the production of morphine or codeine or whatever product is desired. He added that the opium is shipped in this country under very severe guard to the various manufacturers and "there is no chance for them to divert, get a quantity of opium and make so much morphine for the legitimate market and then divert some to the illegitimate market." There is a control on the figures of the quantities of opium allotted to each individual company kept by the Bureau. [Rep. Tr. 363.]

With respect to heroin, Mr. Chappel stated that it is a "contraband". [Rep. Tr. 364.] In regard to the distribution of morphine, when it is manufactured in this country from opium, it is then sold to distributors or retailers on a triplicate order form. The retailer purchases a book which has three sheets with carbons in them called Triplicate Order Forms, each one being numbered. The purchaser keeps one copy of the Order Form and two copies go to the manufacturer or the seller. The latter keeps one copy for his files, as a receipt for the narcotics which he has sold. He then sends the third copy to the Bureau of Narcotics where it is maintained. He further stated that everyone who handles the narcotics from their crude opium form "right down to the doctor or physician who dispenses it", had to be registered and pay a tax. [Rep. Tr. 365.]

The witness testified that during the course of his duties he has attempted to locate any illegal processing points or laboratories which might be extracting heroin from morphine without proper authorization from the government. He stated that he had never found anything which could be called a "clandestine laboratory" in the United States. His answer was inclusive of the nine and one-half years that he had been in the Bureau.

Chappel went on to say that to the best of his knowledge certain agencies, like the United Nations chemist, had been authorized to make certain experiments like synthesizing heroin. Such heroin has been furnished by the Bureau of Narcotics under "special dispensation" and under government control. Such heroin furnished for experimental purposes would be from Lebanon, Turkey, France, some from the United States and some from Mexico. He further stated that there were three or four countries in Europe within the United Nations group who have not outlawed heroin as yet. [Rep. Tr. 366, 368.]

By law all registrants are required to report to the Federal Bureau of Narcotics, Mr. Chappel continued, the loss or destruction or theft of narcotics by affidavit. For instance, if a drug addict would break into a drug house and steal 25 tablets of quartergrain morphine the druggist would be required by law to submit that theft to the Federal Bureau of Narcotics through an affidavit. Although he testified that the local records kept in his office would not be adequate to advise him as to the exact amount of any thefts for any given period of time, particularly the first half of the calendar year of 1957 during which the case was being tried, he stated that the quantity of such losses has been small. [Rep. Tr. 370-372.]

V.

ARGUMENT.

1. The Issues.

As a preliminary statement the Government feels that it would be helpful to clarify the issues involved in the trial of this case.

It is obvious that the primary elements of the offense as charged in each count of the indictment are the sale, the unlawful importation, and the knowledge of the defendant that the heroin was unlawfully imported. The Government's theory on trial was to prove the sales by evidence of specific facts involved in each transaction and to prove the unlawful importation of the heroin and the knowledge of appellant of such unlawful importation by use of the presumption in Section 174 of Title 21, U. S. C. which, in effect, authorizes a conviction upon proof of defendant's knowing possession of the drug. [Rep. Tr. 4, 5, 383, 384.]

The defense was directed to the assertion of the unconstitutionality of Section 174, and this contention in its various ramifications was presented to the trial court on motions made during the course of the proceedings. Evidence was presented by the appellant on the question of unconstitutionality and also on rebutting the presumption in the statute by showing that the heroin could possibly have been manufactured from "lawfully imported crude opium within the confines of the United States." [Rep. Tr. 460] or that it was derived from synthesis in this country. Appellant then "disputed the transaction" [Rep. Tr. 464], endeavoring to prove, with respect to the sales, that there had been an entrapment and, at any event, that the appellant had not had possession of the two quantities of heroin involved.

As the case progressed the Government did offer evidence to prove the two sales and knowing possession in

the appellant, and then relied upon the presumption with respect to unlawful importation and knowledge thereof. After the appellant's evidence was presented and final argument made, it was clear that the only real issues before the jury were: was there a lawful sale or an unlawful entrapment and was the heroin unlawfully imported into the United States. This last issue turned on the question of whether or not the defendant had the "possession" required by the statute. This was also in dispute. In addition to the foregoing there was, as stated above, the legal question of the constitutionality of the statute. [Rep. Tr. 249, 251, 382-384, 394-396, 464.]

The sale or entrapment question are no longer before the Court, the jury having found against the defendant on these issues under proper instructions.

2. The Statute Is Constitutional.

Almost all of the matters raised by appellant with respect to the alleged unconstitutionality of Section 174 of Title 21, U. S. C. are considered in this one Section.

It is clear that the provisions of the statute which relate to the regulation of unlawfully imported narcotics, with the provision of the knowledge of such importation by a defendant, are not an invasion of state police power, even though the particular drug becomes integrated with interstate property.

Steinfeldt v. United States, 219 F. 2d 879 (9 Cir., 1951);

Sheppard v. United States, 236 Fed. 73 (9 Cir., 1915).

It appears that appellant's contentions with respect to the constitutionality of Section 174 have been almost exclusively directed to the so-called presumption contained in the Section. However, before discussing the presumption, appellant's contention that the act is unconstitutional

in that it allegedly invalidly attempts to control synthesized narcotics will be discussed.

The words “narcotic drugs” as used in Section 174 have been construed to mean by Section 3228 (g) of Title 26, U. S. C. as including the substances listed in the act which have been produced “independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:”.

Appellant has proposed no logical reason for his statement that a prohibited drug produced independently by means of “chemical synthesis” has nothing to do with foreign commerce. He attempts to discuss “paverine” at page 45 in his brief, calling it “the chief synthetic narcotic” and comments with respect to its manufacture in the United States during 1955. However, there is absolutely no evidence before the Court and nothing from which the Court can take judicial notice to show that such a drug exists, that it is a synthetic narcotic, that it was manufactured in the United States at all or that it has any connection with heroin.

At any event, it is clear that every possible presumption in favor of the validity of an act of congress should be made until overcome beyond any rational doubt.

Fisch v. General Motors Corp., 169 F. 2d 266 (6 Cir., 1948);

United States v. Smith, 62 Fed. Supp. 594 (D. C. W. D. Mich., 1945).

It is equally certain that the party attacking the constitutionality of the statute has the burden of showing that there could be no reasonable basis for the legislation.

Foley Securities Corp. v. Commissioner of Internal Revenue, 106 F. 2d 731 (8 Cir., 1939);

Fisch v. General Motors Corp., *supra*;

United States v. Bryan, 72 Fed. Supp. 58 (Dist. of Col.).

First, judicial notice will be taken of the fact that heroin is a derivative of morphine, and morphine is in turn a derivative of opium, and all are narcotic drugs within the meaning of the law. At the time of the recent amendment in July, 1956 to the various laws relating to narcotic drugs, a report was made to the Congress, which is contained in United States Code, 1956 Congressional and Administrative News, Volume 2. This report shows, at page 3298, that illicit narcotic drugs continue to flow into our port cities and across our borders from communist China, Turkey, Lebanon, and Mexico, and that the source of supply for illicit traffic is from foreign countries. The sub-committee believed that additional personnel stationed in foreign countries would be as effective a step in combating such traffic in the United States as any other one step that should be taken. Thus, it is obvious that the supply for the traffic, and heroin in particular, comes almost wholly from foreign, not domestic sources. It depends almost entirely on being supplied through smuggling of narcotic drugs from abroad.

Thus, although the report stressed community responsibility for stemming the increase of addiction and the sale of narcotics, the international controls were stated to be the most effective means of eliminating this evil (pp. 3301, 3305-3308, 3311).

In connection with any contention that congress cannot validly control the unlawful importation of synthetic drugs, it is also of interest that at page 3308 the report indicates that the 1948 Protocol providing for international control of "new, dangerous synthetic drugs" throughout the world saved the United States from a *flood* of these drugs from European factories. There it was shown that these synthetic drugs had been manufactured to a considerable extent in Europe and that, although not a flood, there could well be much more than

a trickle of these drugs being smuggled in from factories abroad.

At page 3311 of the report we note that in speaking of barbiturates and amphetamines, it was said that large quantities had been diverted from interstate shipments to illicit channels. No such statement was made with respect to narcotic drugs such as opium and its derivatives, or as to synthetic drugs.

In connection with the question of the statute being constitutional on its face, it is to be noted that at page 3291 of the report, the sub-committee conducted fifteen days of hearings before making a finding with respect to the fact that the illegal traffic of narcotic drugs in the United States is supplied by the smuggling of such drugs from abroad. Thus, it appears that through the committee's report we find the reason for the regulations being in force is still, as it was at the time of the enactment of the statute, that the drug traffic in this country is supplied almost entirely through foreign sources.

It is settled that where a statute is assailed as unconstitutional, the Court must assume the existence of any stated fact which would sustain the statute in whole or in part:

Alabama, etc. v. McAdory, 325 U. S. 450;

Foley Securities Corp. v. Commissioner of Internal Revenue, *supra*.

This Court's attention is respectfully called also to its recent decision of March 26, 1958 in the case of *Ambrose Badillo Caudillo, Joe Romero v. United States of America*, No. 15,734, which was an appeal from the United States District Court for Southern District of California, Central Division. The opinion, written by the Honorable Circuit Judge Barnes, shows that *Caudillo* appealed from three counts (two of sale and one of possession) and *Romero* was appealing from his conviction on two counts

(both of possession) which counts charged violation of Title 21, U. S. C., Section 176 (a). That Section, of course, relates to the receiving, concealment, buying, selling, etc., of marijuana which had been imported into the United States contrary to law and contained similar provisions, including the presumption, as are contained in Section 174. Judge Barnes said, among other things,

“* * * If any constitutional safeguards are violated by section 176-(a) the Supreme Court will strike the statute down by reversing or distinguishing its previous pronouncement. The public interest in the proper control of narcotics traffic requires an intermediate court to proceed with caution. * * *”

The testimony of the defendant's own witness here, Edward A. Carusi, and the government's rebuttal witness, Howard Chappel, corroborated the information set forth in the above cited report and gives “stated facts” which sustain the statute. Both Carusi and the government chemist testified that morphine had been synthesized once about 1952 at the University of Rochester. However, Carusi had not performed any experiments that he had discussed in his direct testimony with respect to synthesization and did not know of any process such as he had described as having been conducted in the United States. He did not testify that synthesization of morphine or heroin had been conducted other than the one instance at the University of Rochester. Further, the witness testified that in the one instance of synthesization which he mentioned, they had started with a very complex material which he had never used or seen himself and which had never been involved or made in a laboratory where he had worked. Furthermore he knew of no laboratory in the United States which prepared heroin for the use of an opiate, as a narcotic.

Howard W. Chappel, agent-in-charge of the Federal Bureau of Narcotics in Los Angeles testified that, among

other things, during the course of his duties for approximately nine and one-half years he has attempted to locate any illegal processing points or laboratories which might be extracting heroin without proper authorization from the government. However, he had never found anything which could be called a "clandestine laboratory" in the United States. He went on to say that to the best of his knowledge certain agencies like the United Nations chemist had been authorized to make certain experiments like synthesizing heroin, but that otherwise heroin was "contraband."

Thus, this testimony fully corroborates the fact that synthetic heroin found in the United States, if there is any in this country, would have been smuggled in from foreign sources.

Counsel for appellant in his opening brief has made several elaborate and completely unwarranted statements with respect to synthetic drugs. Contrary to all the evidence in this case and the evidence produced before Congress at the time of the amendment as contained in the above report, he claims at page 44 that a prohibited drug "produced independently by means of 'chemical synthesis' certainly has nothing to do with foreign commerce." At page 47 he says that "since this court can take judicial notice of the fact that *all* synthetic narcotics are domestically produced, it must agree with the appellant that Congress cannot control them under the illogical guise of foreign commerce". That statement likewise runs contrary to all of the weight of the evidence and inferences which this Court can make therefrom. At page 54 the same illogical thought is pursued when he says with respect to synthetic drugs "because no such smuggling occurs". Counsel does not refer to any evidence or circumstances in any way from which he comes to such a conclusion except, at page 40 of his brief where certain comments are made with respect to a bulletin called

“Traffic in Opium” an “eye-opener in this respect”. As we have stated above this bulletin is not contained in the United States Code and has not been introduced in evidence in the within case and therefore is not before this Court for consideration. Counsel then goes on to attempt to discuss the alleged report drawing such conclusions as heroin could be made from any of the synthetic narcotics mentioned if they are first returned to morphine. However his own witness did not come to such a conclusion in testifying with respect to synthetic narcotics.

At page 41 of his brief counsel for appellant makes an unwarranted statement with respect to certain figures relating to seizures of opium and heroin, again which are not before this Honorable Court in the within appeal. He stated that “these respectively high and low numbers *might very well mean* that the seized drugs come from illicit diversions of lawfully imported or synthesized narcotics instead of being traceable to criminal import.” (Emphasis ours.) This again is typical of the unfounded statements contained in the brief in respect to the synthesization of narcotics which are the result of sheer speculation.

“There is no evil to correct” then says the appellant. Certainly he is at sword's point with the sub-committee in its report to the Congress, and with the testimony given by his own witness, Carusi. The only information to support the appellant's statement is contained in the above paragraph, that certain numbers “*might very well mean*”. That claim is repeated again in the next paragraph as an absolute statement of fact. In other words, his speculation was turned into doctrine by the simple process of repetition.

It is believed that it has been amply demonstrated that Section 174 is constitutional in its control of unlawfully imported synthetic drugs.

It is further submitted that the presumption in the statute authorizing a conviction upon proof of possession unless satisfactorily explained to the jury is constitutional. In the above-mentioned *Caudillo* case recently decided by this Court of Appeals, both appellants urged that Section 176(a) was unconstitutional because there was no rational connection between the statutory presumption and the facts proved thereby. In *Caudillo* it was also urged as a second ground that any presumption was defeated as a matter of law by evidence received in rebuttal in the case.

The Court remarked at the beginning of the decision that Section 174 is an almost identical provision to Section 176(a) and that also there was a similar provision in Section 181, creating the same presumption with respect to opium prepared for smoking. The Court then went on to say the Supreme Court in the case of *Yee Hem v. United States*, 268 U. S. 178 and this Court in the cases of *Hooper v. United States*, 16 F. 2d 868 and *Rosenberg v. United States*, 13 F. 2d 369 had held the presumption not unconstitutional and "this statute has laid down a rule, not of substantive law, but of evidence." The case of *Gonzales v. United States*, 162 F. 2d 870, also a decision from this Circuit was cited to the effect that requirement of proof "to the satisfaction of the jury" is not unconstitutional.

The Court stated that:

"The essence of appellants' joint claim of unconstitutionality is that marihuana, unlike opium, can be, and is grown in California and other southwestern states of the United States, and hence it cannot rationally be inferred from mere possession that that particular marihuana was knowingly illegally imported."

The Court stated that no direct evidence was produced as to whether the marihuana was grown within or without

the United States but there was testimony indicating the marihuana was “unmanicured,” in other words it had seeds and stems and sticks mixed with the leaves. That indicated the marihuana was at least partly made up from the flowering top of a plant and not solely from the leaves. The plant flowers at maturity and very few mature marihuana plants are found growing in California. The appellant’s own witness had testified that he only knew of one seizure of a mature plant with a flowering top in his memory. It was also testified that in the manicured state one could not tell the difference between marihuana grown in the United States and that grown outside it.

It should be noted in passing, in connection with a discussion of instructions, *infra*, that in the within matter there was also no direct evidence offered by the appellant to show that the specific heroin in question had been derived from other than an unlawfully imported narcotic. Circumstantial evidence only was offered in an attempt to show that there was a “chemical possibility” that the heroin could have been synthesized in this country or that there was a possibility that the heroin could have been derived from lawfully imported opium. The evidence showed that such *possibilities* were negligible.

The Court stated that in the *Caudillo* case there existed a factual situation from which the jury could draw the inference that it was extremely unlikely that parts of flowering tops would be found in marihuana grown in the State of California. The jury had been instructed in that respect that they could, but were not compelled to, draw an inference the marihuana was imported contrary to law and that the defendant knew it. It was also explained that there was a possible contrary inference that the marihuana was not imported contrary to law from the whole evidence, including the evidence that marihuana grows in the United States and California and the evidence relating to its growth.

It seems apparent there that the judge was instructing the jury on the one real issue arising from the presumption, as was done herein by Judge Tolin, that is, whether or not the marihuana was unlawfully imported.

If it could be said that there also existed a factual situation in the within case from which the jury could draw any inference with respect to the source of the heroin, then it appears that it would be that it was extremely unlikely that the heroin involved would have been derived from a source within the limits of the United States of America. Since that appeared to be part of the defense raised by appellant below, then the jury did draw such an inference by its verdict of guilty.

At any event, in the *Caudillo* opinion the Court stated that the appellants had correctly argued that the second paragraph of Section 176(a) "creates a presumption which if followed supplies two elements of the crime charged: (1) illegal importation of the marihuana and (2) knowledge by the defendant of the illegal character of the marihuana * * *".

The Court went on to say that both appellants there had relied heavily in their defense on constitutional grounds on *Tot v. United States*, 319 U. S. 462 (1943), (also cited on numerous occasions by appellant Bradford herein.) That was a case involving the Federal Firearms Act which made it unlawful for one convicted of a crime of violence or being a fugitive from justice to have any firearms or ammunition which had been transported in interstate commerce. In that statute "the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, in violation of this Act".

This Court stated that the appellant in the *Tot* case, as in the *Caudillo* matter, attacked the presumption created

by the statute on the ground that there was no rational connection between facts proved and the ultimate fact presumed, and that the statute cast an unfair and practically impossible burden on a defendant.

In commenting on the *Tot* case, the Court stated:

“The difficulty with appellants’ reliance on the *Tot* case is that it provides no precedent in this, a factually different case. The possession of a firearm or ammunition is ordinarily lawful. There exists the possibility of lawful possession of opium derivatives, or other narcotics, for they have definite therapeutic medical values and a scientific need exists for their possession by many doctors in almost every hospital in the United States. But this Court knows of no medical or scientific use to be made of marihuana, save perhaps for occasional testing in order to make scientific comparisons with other narcotics, barbiturates and amphetamines.”

The Court went on to say that:

“The statutory language in question has long existed in the narcotics laws. In *Yee Hem v. United States, supra*, the Supreme Court upheld the presumption in reference to opium. Appellants seek to distinguish the *Yee Hem* case on the ground that all opium is necessarily imported and therefore the presumption is reasonably accurate. However, the Court noted in that case that some opium *is legally* imported, but that the possibility of a defendant having in his possession legally imported opium would be so rare as to permit the legislature to establish the presumption and thereby shift the burden of going forward with rebutting evidence. Ultimately the burden of proof beyond a reasonable doubt remains with the government and the presumption is merely an aid in sustaining that burden. If we agree that

by far the larger part of all marihuana found within the United States is imported then it is reasonable inference that it is probable that one in possession of marihuana is in possession of imported marihuana. And, a fortiori, it can be inferred that the person in possession knows of the illegal importation. ‘. . . The strength of any inference of one fact from proof of another depends upon the generality of experience upon which it is founded.’ Though there might be differences of opinion, it can reasonably be argued that the facts of marihuana importation are so well known, particularly to marihuana users, that ‘there is a rational connection between the fact proved and the ultimate fact presumed.’ It might even be urged that the inference could be said to exist independent of the statutory authority therefore
* * *”.

At page 8 of the decision, the Court stated:

“Finally, the Supreme Court had held that merely because it might be *possible* to legally import opium into this country, the presumption created by the legislature that allows the jury to draw an inference of illegal possession and knowledge of that illegality was valid. We can envision the *possibility* of opium poppies growing in this country, yet that fact will not cause us to declare Section 174 unconstitutional. We believe the permissible inference the jury may draw as to the unexplained possession of marihuana is supported by facts more closely resembling the permissive inferences in the general narcotic trade than the conclusive presumption which was required to be drawn in the firearm statute. The former has been held constitutional, the latter not. If any constitutional safeguards are violated by Section 176(a), the Supreme Court will strike the statute down by

reversing or distinguishing its previous pronouncement. The public interest in the proper control of the narcotic traffic requires an intermediate court to proceed with caution. This is particularly true under the facts of this case where a question for the jury was created by the expert testimony produced on behalf of both defendants.”

The Court went on to discuss Caudillo’s second point which was “the defeat of the presumption as a matter of law” and stated two failings which existed in it. The “better view” was adopted that “a *valid inference remained even after there is rebutting evidence, either of the fact upon which the inference is based or those sought to be proved by it.*” The Court then concluded by stating that the jury was entitled to consider the presumption and determine if, notwithstanding the rebutting evidence, the side relying on the inference had sustained its ultimate burden of proof. Since the jury had returned the verdict of guilty there the Court felt that it was clear that appellant had failed to convince them that the possession was other than illegal and further the inference permitted by the statute “was sufficient to convince the jury beyond a reasonable doubt that both appellants knew the marijuana in their possession had been illegally imported.”

The judgment as to each defendant in the *Caudillo* case was then affirmed.

In the within case appellant appears to be contending that the case of *Gonzales v. United States*, a decision from this Court of Appeals has to be written directly into the so-called presumption in Section 174 as a definition of “satisfaction” in the last paragraph. Thus, he contends, Congress passed a law which regulates all heroin, regardless of the source, whether traceable to a lawful or unlawful import or derived from synthesis.

In connection with his discussion as to the lack of triviality in this argument he endeavors to discuss the bulletin "Traffic in Opium" which, again, is not before this Court for consideration. He seems to state that if it is impossible to show the legality of importation, or demonstrate the innocence of appellant's mind, or offer evidence to synthesization of narcotic drug in appreciable quantities with respect to any certain quantity of heroin which had been fully integrated in intrastate goods, then Congress was regulating a narcotics problem exclusively under the jurisdiction of the state.

It appears that this contention is primarily based upon a confusion of the language of the *Gonzales* case.

There is no possible showing of "lawful" possession with respect to heroin says the appellant, disregarding the possibility of showing a possession for certain limited purposes such as experimentation, and he goes on to state that this results in the regulation of all heroin, regardless of the source.

A careful reading of the language of the *Gonzales* case shows that Judge Stevens stated:

"* * * the satisfaction of the jury as to the explanation turns upon whether or not the possession was *within the exception* provided in the statute."
(Emphasis added.)

This language has a different meaning than the interpretation placed upon it by the appellant. It does not indicate in any respect that compliance with the Harrison Stamp Act is the only affirmative defense under Jones-Miller Act.

With respect to lawfully imported opium, or its derivatives, which might become, since the importation of the opium, illicitly diverted, or a synthetic drug manufactured in this country and also so diverted, it is to be noted that language of the *Gonzales* case allows an ex-

planation of possession "within the exceptions provided in the statute." Thus, it is not compliance with the Harrison Stamp Act which would offer the only defense to one indicted under Section 174, where the Government relies upon the presumption, since the lawful importation of opium, illicitly diverted after importation would be a defense under the language of *Gonzales*. This is one of the exceptions provided in the statute namely, Section 174. A similar defense appeared to have been raised in the *Caudillo* case, that is, that the marihuana could have come from domestically grown plants. With respect to heroin, agent Chappell's testimony showed that laboratories or persons connected with them are sometimes allowed to synthesize or possess heroin under special dispensation from the Government for experimental purposes in this country. Thus, it is obvious that a defense under a prosecution under Section 174 could be made on proof of lack of unlawful importation if the heroin had been derived from a quantity which had been synthesized in this country for experimental purposes.

The word "lawful" possession may have been used loosely in some of the cases but the exact criterion to be used is that set forth in the *Gonzales* case, that is whether or not the explanation shows a possession "within the exceptions provided in the statute." This was recognized by counsel and by Judge Tolin in the instructions in within case since he mentioned that not only could a defendant show possession for experimental purposes (although such a defense was not tendered here) but also that there would have been no case against him if he showed the heroin had been derived from narcotics which had been originally imported lawfully and diverted since that time.

As indicated above, one of the primary theories of defense below was an endeavor to rebut the presumption by proving by circumstantial evidence that the heroin

could have been derived from a drug synthesized in this country or from opium which had been lawfully imported and subsequently diverted. The defendant recognized that this was allowed under the statute since he tried to show the “chemical possibility” of the synthesization, together with the extent of lawful imports, followed by an unsuccessful attempt to show (but only in Los Angeles County) thefts of narcotic drugs from the licensed holders of these narcotics. Although the evidence actually proved the extremely strict control over lawful imports and the small quantity of any thefts from such persons or doctors or other licensed holders, the defendant still proceeded in this theory of a defense.

The jury was told by Judge Tolin that if they found that the heroin was manufactured in the United States “then there is no case against this defendant”. As in the *Caudillo* case they were also told that the presumption that:

“if heroin is found in the United States it is imported heroin is not conclusive. It is a presumption, that is, it is a circumstance which you are to consider as so, if it is proved that the heroin was here and in the possession of the defendant, but it is not necessarily conclusive that this be the case. This law suit is open to the insistence by the defendant that this was, in fact, domestic and not imported heroin.” [Rep. Tr. 436.]

As far as we can ascertain, the word “lawful” was not used during the jury instructions. The expression was used by counsel [Rep. Tr. 464] in arguing a motion for a judgment of acquittal. At that time he stated that if possession was unlawful, then there was no reason why a defendant could not go forward and prove that he stole it, for example, from the Dow Chemical Laboratory after the narcotic lawfully entered the country. Judge Tolin replied that such was the case, but that appellant

did not do that. The Court then stated the theory of the defense, which has been developed through the statements, evidence, instructions and arguments, to the effect that appellant relied on showing a "chemical possibility", that is, that a person could take morphine and make heroin out of it in this country and, further, that appellant "disputed the transaction".

Congress thus does not regulate all heroin regardless of lawful or unlawful importation since there are affirmative defenses available under the "exceptions" in the statute by which it can be shown that the drug was either a synthetic heroin manufactured in this country or that the opium from which it was derived was lawfully imported. If a defendant experiences difficulty in this respect (probably since almost all heroin, natural or synthetic, does come from abroad) the constitutionality of the statute is not affected in that he would be given an opportunity to show the true source of the drug involved. This the defendant attempted to do and was allowed to do; it was one of the main theories of his defense. Assuming, *arguendo*, that the only defense which could be shown under the statute was one which cast "an unfair and practically impossible burden on a defendant," there is no evidence before this Court to show that there would be any more than infinitesimal quantity of narcotics thereby "controlled" as derived from lawfully imported narcotics or synthesized in this country.

As a matter of fact, this Court can indulge in the inference that almost all heroin does come over the borders of the United States by unlawful importation, considering the material contained in the sub-committee report, the evidence in the case as to the strict control of lawfully imported opium and the negligible amounts of morphine which have been synthesized, particularly agent Chappell's testimony as to the fact he has not found any "clandestine" laboratories manufacturing heroin in a substantial por-

tion of California for approximately ten years and that heroin is a contraband. However, should a rare situation occur where heroin which was not involved in an unlawful importation, a defendant still has his opportunity under the presumption in Section 174 in the *Gonzales* case to present his defense. Thus the presumption is entirely reasonable since there is a rational connection between the statutory presumption and the facts proved thereby.

See *Yee Hem v. United States*, 268 U. S. 178, *supra*,

There will be a further discussion on this subject on the possible limitations of rebutting the presumption in connection with the treatment of the Court's instructions hereafter.

Appellant also contends that there is an "authorization" in the last paragraph of Section 174, which contains the presumption to the jury to return a "conviction" of unlawful sale and that such an authorization is unwarranted. At page 48 of his brief he claims that possession has been held sufficient to prove a sale, "simply with the aid of the statutory presumption". At page 49 of the opening brief appellant then cites the *White*, *Stoppelli*, *Ng Sing* and *Pitta* cases in support of that contention. All of those cases were decisions of this circuit, except the *White* matter. He then goes on to state that some Courts of Appeal believe the presumption goes only to the unlawfulness of the importation and the defendant's knowledge thereof and cites certain cases in connection with that statement. Appellant then remarks that although the latter cases appear to be more reasonable and fair, it is a "tortious" interpretation of the statute, "for the statute expressly provides that possession authorizes *conviction*, not the inference of unlawful importation and knowledge. However, apparently this Court of Appeals has not agreed with that contention in any of its decisions, apparently not believing that a holding

the presumption goes only to the unlawfulness of the importation and the defendant's knowledge is not "tortious" as an interpretation of the statute.

Not only do the *White*, *Stoppelli*, *Ng Sing* and *Pitta* cases not support appellant's contention that the law in this Circuit holds possession is sufficient to prove a sale, but the above cited recent decision of this Court in *Ambrose Caudillo*, *Joe Romero v. United States*, *supra*, expressly states that the same language in Section 176(a) creates a presumption which if followed supplies two elements of the crime charged; "(1) Illegal importation of marihuana, and (2) Knowledge by the defendants of the illegal character of the marihuana * * *."

It certainly cannot be said that the holding of this circuit that the presumption applies to the elements of importation and knowledge thereof is unreasonable or arbitrary. It has been established in the United States Code that the hearings which preceded the enactment of the statute were substantially geared to the question of importation, the source of the drugs and the general reputation in the illicit traffic of narcotics of such facts. That an unlawful importation of heroin and knowledge thereof by a defendant selling the drug illicitly in this country are two elements of the crime which can most reasonably be said to be established by overwhelming evidence of the well known circumstances surrounding the flow and origin of unlawful narcotics can hardly be doubted. Those are the elements in a charge under Section 174 which normally cannot be proved specifically with relation to each quantity of heroin, but which are established as indicated above by overwhelming evidence of the facts surrounding the illegal traffic of narcotics. It is thus reasonable that the presumption should be geared only to those two elements and that the other elements of the crime involving the particular transaction should be the subject of specific proof in each case.

Not only is the law in this Circuit to the effect that the presumption only applies to the elements of unlawful importation and knowledge thereof, but the jury was fully instructed to the effect that the Government had to offer specific proof of a sale.

During the course of instruction counsel for appellant stated to the Court:

“About the presumption, your Honor, it says that would justify a conviction. The presumption doesn’t raise any inference there was an unlawful sale or facilitation of the sale.”

In response to counsel’s remarks the Court further instructed the jury:

“In order for there to be a conviction in a case of this character it is necessary there be proof there actually was a sale. There is no presumption there was a sale. You look to the evidence to determine whether there was or was not a sale. The presumption comes into play only if the defendant is shown by the evidence to have had possession of the narcotic substance, if you find it to have been such.”

Thus, during the trial, counsel’s theory was that the presumption didn’t raise an inference of unlawful sale, although now it appears to be that the statute expressly refers in its presumption to the element of sale as well as unlawful importation and knowledge thereof. Even if counsel could be said to be correct, which he is not, the statute could not be held to be unconstitutional as applied to this case since the jury was fully instructed that they had to find a sale before they could convict the defendant.

The presumption is attacked finally on the basis that it contains a “conclusive presumption of fact.” This par-

ticular point has been fully discussed in the above cases and it will not be repeated to any great length again. Appellant merely repeats his contentions with respect to the *Gonzales* case, which as stated above, is based upon a confusion of the language of that case, and his unwarranted statements with respect to “established facts” as to the synthesization of narcotics and illicit diversion of lawfully imported narcotics. Appellant refers again to the *Tot* case, 319 U. S. 463, which, as stated above, this Court considered in the *Caudillo* matter. We point once more to the fact that the appellant in the latter case complained that the statute cast an unfair and practically impossible burden on the defendant. This Court stated, with respect to that contention, that the *Tot* case is a factually different matter. Judge Barnes went on to say that, in effect, there was a rational connection between the facts proven and in the ultimate fact presumed. Furthermore, as we have stated, the defendant does have his defenses under the *Gonzales* case, even though the possibility of proving possession of heroin from legally imported opium or some which had been synthesized in this country would be “rare.” See *Yee Hem v. United States*, *supra*; *Copperwaite v. United States*, 37 F. 2d 846. Furthermore, it might be said to be a possible defense, as was presented in the within case, that the defendant could attempt to persuade a jury that the particular heroin involved was derived from such sources by circumstantial evidence as to a “chemical possibility” or that such heroin *could have been* derived from lawfully imported opium.

Thus, the presumption is not conclusive and conforms to the well-know facts of the source of heroin.

3. The Jury Instructions Were Adequate.

- (a) The Trial Judge Did Not Err in Instructing the Jury That the Heroin Involved in the Case Could Be the Result of Chemical Synthesis.

This objection to the instructions has already, in effect, been explored by the above discussion of the synthesization as it effects the constitutionality of the Act. It is quite clear that the Act is not unconstitutional in that it also includes synthesized narcotics within the meaning of the words "narcotic drugs."

Counsel for appellant is still basing his conclusions upon unwarranted assumptions as to the circumstances surrounding the synthesization of narcotics. In talking about synthetic drugs, he states that "no such smuggling occurs" and therefore the law is arbitrary because it purports to correct no existing evil.

The Government has already shown that *if* there is any synthetic heroin involved in the illicit traffic of narcotic drugs in the United States, it would of necessity have come from a foreign source. The only conceivable source of such a drug from within the confines of this Country would be from a negligible amount, possibly synthesized in an experimental laboratory under strict control. Even so, the evidence only shows that this was a "chemical possibility" and there has been no direct evidence that heroin itself had been synthesized. The testimony of the witness Carusi and Agent Chappel showed that the likelihood of any lawfully imported opium being diverted and thereafter morphine being manufactured from the opium, followed by a manufacture of heroin from the morphine is so unlikely as to be practically nill. If there is any synthetic heroin being sold in the illegal traffic of narcotics, and it may well be that *all* of the heroin in such traffic has been derived from a natural source in a foreign country,

then such a synthetic drug would have had to have been unlawfully imported.

Counsel for appellant claims that the presumption is alone sustainable on the assumption that the source of morphine and morphine derivatives “are chiefly grown in foreign countries, not that they are synthesized there.” However the fallacy with this statement is that the cases which have sustained the validity of the presumption happen to involve a natural substance such as opium or morphine manufactured from opium, and the possible synthesization of morphine or heroin was apparently not known in those days. The *Copperwaite* case, 37 F. 2d 846 was decided in 1930, the *Yee Hem* case, 268 U. S. 178 was decided in 1925, *Moe Liss*, 105 F. 2d 144 in 1939, *Gee Woe*, 250 Fed. 428 in 1918, etc.; it is not surprising that the synthesization of narcotics was not discussed in these cases. However, there is no reason whatsoever why the presumption is not sustainable on the inference drawn from the facts before Congress and the evidence in this case that the source of synthetic drugs is chiefly from foreign countries, just as the source of opium is from abroad.

In conclusion on this particular point, again the presumption has a “rational connection between the fact proved and the ultimate fact presumed.”

**(b) The Trial Judge Did Not Err in Instructing the Jury
With Respect to Knowledge of Unlawful Importation.**

In connection with this assignment of error on appeal, it appears that a résumé of the pertinent portions of the instructions is called for. The Government respectfully urges that considering the instructions as a whole no error was committed by the trial judge in instructing on the various elements which the jury had to find in order to return a verdict of conviction. First of all, the Court

stated to the jury that “the duty of deciding the facts, questions of what the evidence proves, if anything, all of those matters of resolving the disputes of fact are matters for the jury * * *” [Rep. Tr. 419.] He continued:

“But remember at all times that you are the sole and exclusive judges of the facts in the case, * * * just bear in mind that you have the responsibility to decide those facts and I do not. Hence, do not look to me for a decision on the facts, but take the law to be as I declare it.” [Rep. Tr. 420.]

The Court also instructed: “It has been pointed out to you that a defendant is presumed to be not guilty and that presumption remains with him until and unless you believe from the evidence that he is guilty beyond all reasonable doubt.” [Rep. Tr. 420.]

The Court then went on to advise the jury that the indictment provides the defendant with information as to the charges so that he could marshal his defense to the particular charges. He then also stated that the charges contained in the indictment and nothing else were the charges against the appellant. [Rep. Tr. 422.]

Judge Tolin then read the two counts of the indictment verbatim. Each count in effect charged that on or about a certain date, the defendant knowingly and unlawfully sold and facilitated the sale of a certain quantity of heroin, “which said heroin as defendant then and there well knew had been unlawfully imported into the United States.” Thus, each and every element with which the defendant was charged was read to the jury in the exact language of the indictment. [Rep. Tr. 423.]

Thereafter, the Court read the statute, Section 174, Title 21 U. S. C. to the jury verbatim. By reading the statute, the Court called the attention of the jury to the basic elements of the crimes with which he was charged.

The statute, of course, provides for an offense for one who knowingly, among other things, sells, or facilitates the sale of any narcotic drug which was imported or brought into the United States contrary to law knowing that the said drug had been imported or brought into the United States contrary to law.

The Court then went on to read that portion of Section 174 which provides that: "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." [Rep. Tr. 423-425.]

Judge Tolin then went on to explain some general facts about the statute in that it covered many different types of narcotic drugs. He stated that a person might lawfully possess some of them and others are absolute contraband. He said that there was no right to lawfully possess heroin in the United States, but made the exceptions of some very rare circumstances. He then gave the jury some further background with respect to the enactment of the statute and the provisions of the constitution relating to certain police powers reserved to the individual states and stated that the United States, as such, does not have a general police power. He informed them then that if the United States has power to regulate heroin, it must be a power incidental to some one of the purposes of government which are delegated by the constitution to the United States, as distinguished from those reserved to the states.

"The United States does have a right to govern imports and imported things. Therefore, the particular statute under which this offense is charged is one relating to imported heroin, and the jury must find that the heroin was imported in order to justify a conviction. * * *" [Rep. Tr. 424, 425.]

The Court then went on to explain the nature of a presumption. "A presumption is simply the acceptance of a certain state of affairs as being true until and unless there be evidence which shows that it is not true. It is an inference which the law directs to be drawn from certain facts. * * *". The Court then gave the instruction which is objected to by appellant at page 57 of the opening brief; however, it is obvious that the Court there in connection with the defendant's knowledge of importation was explaining to the jury the basic grounds for jurisdiction of the United States over the importation of narcotics. Although he was also talking about the presumption which is contained in Section 174, he was actually giving the jury certain background facts relative to the power of the United States to govern "imports and imported things." [Rep. Tr. 425, 426.] The Court never told the jury that the presumption did not cover the question of knowledge and it is clear from the instructions as a whole that that element of the offense was covered by the presumption relating to possession of the drugs. He was in effect explaining to them that under the powers delegated to the United States pursuant to the constitution, if this particular heroin was not "unlawfully imported heroin," then there was no case for the jury because that was not a substance over which the government had any regulatory powers.

Judge Tolin stated "Hence, you are here to decide two cases only. The two cases that are set forth in the indictment, that is, the alleged August 28, 1956 charge and the alleged August 31, 1956 charge, and those are the only charges, and Mr. Bradford, the only defendant before you." [Rep. Tr. 426, 427.] As stated above, he had previously read the statute and charges verbatim, which included the element of knowledge of unlawful importation, and also that portion of Section 174 which stated that

possession would be sufficient to warrant a conviction unless satisfactorily explained to the jury.

Later in the instructions [Rep. Tr. 431], the Court explained to the jury that the presumption to which he had referred was that part of the statute which he had previously read authorizing the jury to convict if they found possession in the defendant, unless the possession were explained to their satisfaction. At that point, he stated that there are some proper possessions which the defendant could use to explain away his possession.

The Court then invited exceptions to the charge stating that "I sometimes forget things and this is the time the court shall ask the counsel to remind him." [Rep. Tr. 432.] At that time, counsel for appellant spoke to the Court: "About the presumption, your Honor, it says that would justify conviction. The presumption does not raise any inference there was an unlawful sale or facilitation of the sale." In answer to that statement, the Court then instructed the jury that: "In order for there to be a conviction in a case of this character, it is necessary there be proof there actually was a sale. There is no presumption there was a sale. You look to the evidence to determine whether there was or was not a sale. The presumption comes in to play only if the defendant is shown by the evidence to have had possession of the narcotic substance, if you find it to have been such." [Rep. Tr. 432.] Thus, it is obvious that the Court was indicating to the jury, considering the above quoted instruction and the instructions as a whole, that the only element of the crime which was not covered by the presumption was the sale. That would leave the unlawful importation of the drug and the knowledge of the defendant thereof the two elements which the jury would then have covered by the presumption relating to possession.

Judge Tolin then instructed the jury as to the fact that possession is sometimes actual and in other instances constructive, giving them a definition of constructive possession, “* * * where a person has dominion and control over a thing, having immediate ability to produce, handle or deal with it, but does not actually have it in his own hand.” At that time counsel for appellant indicated to the Court that: “In the definition of ‘possession’, your Honor, I think you left out the element of intent.” Thereupon, the Court stated to the jury “possession must be a *knowing, wilful* possession. (Emphasis ours.) No one is held to possess a thing, within the meaning of this law, if he doesn’t know what he possesses. It is a *knowledgeable willing* possession which is intended by law.” [Rep. Tr. 432, 433.] Thus, it was definitely established that the jury must find that the defendant had a possession that was knowing and wilful, thus eliminating inadvertence, accident or a mistake. [Rep. Tr. 433.]

Finally, counsel for appellant took exception “to the instruction that it is not necessary for the government to prove beyond a reasonable doubt that he had knowledge that the drugs were imported.” [Rep. Tr. 435, 436.]

In the first place, it is submitted by the Government that there was no such instruction given by the Court and that a fair construction of the instructions as a whole showed the jury that the element of the defendant’s alleged knowledge of the drugs was unlawfully imported was covered by the presumption which warranted a conviction on a showing of possession. In connection with the Court’s instructions on knowledge of importation [Rep. Tr. 431] which had been mentioned in Appellant’s Opening Brief, it also appears to be a fair statement that the first remark refers primarily to his original comments with respect to the jurisdiction of the United States to control the importation of narcotic drugs. The last part

of the sentence of the same paragraph [Rep. Tr. 431, 432] certainly was understood by the jury to have referred to the fact that the presumption covered the element of knowledge of importation, which was at issue.

Secondly, the appellant in posing an "exception" made no suggestion as to the basis or reasons of such exception but merely commented that the exception was taken to this alleged instruction. Furthermore, no different or related instruction on the subject of knowledge of importation was offered to the court, although the court had invited counsel, in effect, to submit any changes which should be made in the instructions.

Near the conclusion of the instructions the court also stated after conferring with the counsel that "The presumption that if heroin is found in the United States it is imported heroin is not conclusive." He went on to say "this law suit is open to the insistence by the defendant that this was, in fact, domestic and not imported heroin."

The court further instructed:

"If you find some evidence that this heroin involved in the case, if you believed it to be heroin, if you find that it actually is heroin, if you believe from the evidence in the case that it was manufactured in the United States then there is no case against this defendant.

"However, you must look to the evidence in this connection. The law suit must be decided upon the evidence before you and not upon surmise or conjecture." [Rep. Tr. 436-437.]

There was no further objection or exception taken by counsel with respect to that subject. The court explained that it was a rebuttable presumption. The practical effect of this evidentiary rule obviously was that

the government was not put upon its proof to actually prove unlawful importation and knowledge thereof. And the court made it clear that the presumption did not cover the element of sale. Hence all the instructions covered the elements in the indictment of unlawful importation and knowledge thereof; the jury knew the government could rely upon this presumption for those two factors. That the defendant could rebut the presumption was made clear by the instructions.

Referring to our previous statement of the issues herein, the theory of the prosecution was to establish by proof (1) the facts of the two sales and (2) the knowing possession by appellant of the heroin. It appears appellant attempted to show that even if there were lawful sales he did not have possession of the heroin. He further attempted to rebut the presumption which arises upon a proof of possession, by showing that the heroin involved could have been produced from lawfully imported opium or synthesized in this country. Therefore, it appears that the issues as shown by the evidence, opening statements and argument of counsel were whether or not there were unlawful sales, or an unlawful entrapment in each case, and whether or not the heroin was unlawfully imported into the United States. Of course, the latter issue turned on whether or not the government proved "possession" as required by the statute. As stated above, appellant had offered evidence of a "chemical possibility" that the heroin could have been derived from synthesis and also attempted to show that it might have been manufactured from lawfully imported opium. This evidence was tendered in rebuttal to the presumption on the question of whether or not the heroin in the case had been unlawfully imported.

Since the defendant had attempted to rebut the presumption by endeavoring to show that the heroin was not unlawfully imported, it is obvious that the Judge

was instructing the jury on all of the real issues which were litigated in the case as shown by the evidence and framed by the opening statements and arguments of counsel. The Court told the jury that they must find sales, must find knowing possession, and must find that the heroin had been unlawfully imported. Even though knowledge of importation is an element of the offense, it was established by proof of possession, as the jury was, in effect, instructed. The jury's verdict under the instructions necessarily found that the sales had been consummated and that the defendant had possession of the heroin. Obviously, they had made a finding that the heroin had been unlawfully imported and rejected the defense theory that it came from a "domestic" source. Thus, they followed the presumption which in itself established the knowledge of unlawful importation.

Even if it could be said that the Court's instruction was not a clearly exact statement of the law, it was not prejudicial because it did not pertain to the issues properly litigated.

The courts have held that the defendant cannot merely make a bald denial or show "guilty" knowledge in rebutting the presumption. In the case of *Rosenberg v. United States*, 13 F. 2d 369 (9 Cir., 1926), this Court discussed the rebuttable presumption in Section 174.

"In no way is there compulsion that defendant shall testify. He may produce witnesses who may truthfully and without difficulty satisfy the jury that his possession was had in an *honest* and *legitimate* way. He may rely upon circumstances developed by the evidence of the prosecution as negating unlawful possession, or he may himself testify and explain how he became possessed of the drug."

This Court went on to quote from the case of *Yee Hem v. United States*, *supra*, as follows:

“‘legitimate possession, unless for medicinal use, is so highly improbable that, to say to any person who obtains the outlawed commodity, ‘since you are bound to know that it cannot be brought into this Country at all, except under regulations for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut the natural inference of lawful importation, or your knowledge of it’ is not such an unreasonable requirement as to cause it to fall outside the Constitutional Power of Congress.’”

The case of *United States v. Feinberg*, 123 F. 2d 425 (7th Cir., 1941), also holds that “the explanation of possession, however, if it is to serve the defendant’s purpose must not only be believed by the jury but must also be one that shows a possession lawful under the statute.” In other words, such *lawful* possession tends to show that the narcotics were not imported contrary to law or defendant had no knowledge of such unlawful importation. If this is a correct statement of the law, then it is obvious that the defendant has not been prejudiced by the instructions in this case. There was absolutely no evidence offered by the defense to prove that this defendant got possession of the heroin in an “honest and legitimate way” and, therefore, as a matter of fact, no rebuttal was given to the presumption on the question of knowledge of unlawful importation, which presumption was relied on by the Government to authorize conviction.

From the foregoing, it appears that the only defense, in effect, which can be offered to rebut the presumption on the fact of knowledge of unlawful importation is an explanation of *honest* and *legitimate* possession. Of course, such evidence would also tend to rebut the fact of unlawful

importation. However, this Court in the *Caudillo* case approved instructions which also allowed a defendant to present a defense to rebut the fact of unlawful importation, proved by the presumption, through circumstantial evidence that the Marihuana was domestically produced. The opinion indicates it was not offered to rebut the fact of knowledge, but of unlawful importation, and is the same type of defense which was presented in the within matter. Since the Government must prove both unlawful importation and knowledge thereof, such evidence to rebut the one fact of unlawful importation could *conceivably* be the basis for a verdict of acquittal, if believed by the jury, without going into the question of knowledge. However, it is urged that if the defense is also attacking the presumption on the issue of his knowledge of unlawful importation, then he must make the “lawful” possession showing required by the *Rosenberg* case, *supra*. This is a logical requirement under the well known facts of the illicit narcotics traffic in the United States. Proof of “lawful” possession is the only defense which would, under all the circumstances, have any reasonable tendency to rebut the presumption on the fact of knowledge.

(c) The Trial Court Did Not Err in Its Instructions With Respect to Rebutting the Presumption.

With respect to appellant's contention that the judge erred in telling the jury that unless the possession of the heroin was “lawful” the appellant could not successfully rebut the presumption, the Court instructed the jury that “* * * if you find that it actually is heroin, if you believe from the evidence in the case that it was manufactured in the United States, then there is no case against this defendant.” [Rep. Tr. 437.] Thus, it appears that the Court was recognizing a defense tendered by the appellant, as was discussed in the preceding section, that is, that the heroin might have been synthesized in this country or ob-

tained from lawfully imported heroin in the United States. Anyway, the presumption is not unconstitutional if it could be said that the only defense to rebut knowledge relates to “lawful” possession, because of the well-known facts and circumstances surrounding the illegal traffic of heroin. In this situation, the fact that Congress created a presumption which can only be rebutted by a showing of legitimate possession, is not unreasonable or arbitrary. It is well known that almost all of the heroin which is in this country is the result of unlawful importation, since it is contraband except for having possession under certain strict conditions. However, the appellant does have the opportunity to show a lawful possession if it happens that his is the rare occasion in which an “honest and legitimate” possession had been obtained. Obviously, if such a possession were explained to the satisfaction of the jury it would indeed negate the unlawful importation or knowledge thereof. As stated previously, that is why there is a considerable amount of language in the cases which discussed a “lawful” possession to the effect that the appellant can rebut the presumption relating to unlawful importation and knowledge thereof. Counsel for appellant remarked that the *Feinberg* case can be “taken to mean” to comment to a certain effect. However, the language of the *Feinberg* case at page 427 was not a comment but a holding in the case.

In *United States v. Moe Liss*, 105 F. 2d 144, the Court of Appeals for the Second Circuit also held, as did the Court of Appeals for the Seventh Circuit in *Feinberg*, that the explanation of possession must be one of a “lawful” possession. The Court stated at page 146, “So it is accurate to say that the explanation of possession, if it is to serve the appellant’s purpose, must not only be believed by the jury but must also be one that shows a possession lawful under the statute * * * it goes without saying that Congress did not intend that an explanation which shows

guilty knowledge by the appellant would suffice.” The Court then went on to distinguish *United States v. Turner*, 65 F. 2d 587 (2d Cir., 1933), by saying that the particular charge was erroneous, as shown in the final sentence of that opinion. It might be noted in passing in the *Turner* case, the Court stated that the question for the jury was whether or not the appellant received the heroin for a lawful or unlawful purpose at the time; by inference the Court was saying that lawful possession in the appellant in that case could have rebutted the facts proved by the presumption, that is unlawful importation or his knowledge thereof.

At any event in this case the Court did recognize in the instructions one of the issues litigated in the case, that is, whether or not the heroin, according to the appellant's theory, could have come from a “domestic” source. There was no explanation that his possession was “honest” or “legitimate.” Therefore it is difficult to see how he could have been prejudiced by any of the Court's instructions if this Court holds that the only explanation to rebut knowledge of unlawful importation is one of a “lawful” possession. There was no evidence before the jury which even hinted that the appellant had obtained the heroin honestly or legitimately; in fact the appellant admitted that he made the sales of heroin, contending that he had been entrapped, and, further, that he had not had possession of the drugs.

In conclusion, it is submitted that law is to the effect that the only defense which can be tendered by an appellant to rebut the fact of knowledge proved by the presumption in Section 174 is one which shows an “honest and legitimate” possession. This is true because of the reasonable inference to be drawn from all the facts and well known circumstances surrounding the illegal traffic of heroin. Almost all of the heroin which is concerned in such traffic comes from foreign sources and is not synthesized in this country and is not derived from opium law-

fully imported into the United States. In view of that, it would be unrealistic to say that the appellant could come in and make a bare denial of importation or state that he did not know whether or not the drug was imported. The facts involved in the traffic of heroin do not support the reasonableness of contending Congress intended to allow such a defense. If the appellant is one of those individuals who can prove he has an explanation to satisfy a jury got the heroin in a rare circumstance honestly and legitimately, then Congress and the decision of the Courts obviously shows he has his opportunity to prove such possession.

Appellant was allowed the opportunity to prove the lawfulness of the importation of the opium from which the heroin was derived or its domestic synthesis and the instructions so informed the jury. He said that there will be no case against the appellant if they found that the heroin had not been lawfully imported. Thus, the appellant cannot claim that he was prejudiced in any way by the instructions.

(d) Instructions With Respect to Possession Were Not Erroneous.

Appellant's argument with respect to his instructions quoted at pages 68 and 69 of his brief seems to have in mind a different factual situation, as indicated by the cases he cites, than the evidence which was developed in this case. *Willsman v. United States*, 286 Fed. 852; *United States v. Pisano*, 193 F. 2d 355; *United States v. Maroy*, 248 F. 2d 663, and *Wall v. United States*, 65 F. 2d 993, all involve cases where possession was *proved* to be in one person and *that* possession was ascribed to the various appellants.

As the appellant admits in his opening brief at page 77, "as for possible association with Pat, in selling narcotics, the evidence is completely lacking. The government did

not establish who Pat was, nor was the appellant ever seen in the presence of the deliverer.”

There was little evidence in the case with respect to “Pat” and certainly possession of the narcotics was never proved to be with him. He was merely mentioned as Bradford’s “connection” but there was nothing to show that he was ever upon the scene of any of the transactions mentioned in the trial. The question was not whether the possession of some one else would be imputed to Bradford, but whether or not appellant had possession as required by the act. We will assume that the appellant got the heroin from some place, at some time, before the agent was able to pick it up from the spot to which he was directed, but the evidence does not show that anyone else had possession, either constructive or actual, during any of the times when appellant and Agent Farrington were at or near the narcotics. If it had been shown that some other party had such possession, then the question might have arisen as to whether the other person’s possession could be made the possession of Bradford. However, such is not the case.

Appellant is the one who made all of the negotiations for the sale of the two quantities of heroin involved in this case and he made them in the usual devious fashion employed by those constantly engaged in the illegal traffic of heroin. He was not a man merely working as a broker or making an introduction or vouching for the seller, but he was the actual moving party who undertook to carry out the sales and make the delivery of heroin.

In the first transaction, appellant took care of all the arrangements for the sale of heroin, fixed the price, took the money, and directed the agent to the place where the delivery would occur. The appellant even stated that he was going to do something he didn’t want to, that is go to the agent’s “hand,” which means in the illicit traffic of narcotics, that the delivery would be made “hand to hand.” When the agent actually arrived at the location described

to him the narcotic was found directly beneath the rear wheel of appellant's vehicle which was parked in the street. There was no justification for an assertion that anyone else had possession of the narcotics at that time but appellant. When the agent arrived appellant had absolute control and dominion over that quantity of the drug.

During the second transaction, again appellant made all of the negotiations, fixed the price and led the agent to the palm tree where the heroin was picked up by Farrington. Again, there was absolutely no evidence to show that anyone else had possession at that time and the only reasonable inference from the evidence was that the appellant had absolute control and dominion over that particular narcotic.

That part of appellant's proposed instructions starting at page 68 of his opening brief to the effect that the question of possession "of another person," could not be deemed "possession in the appellant unless a conspiracy is established between such person and the appellant," is completely inapplicable to the evidence in this case and therefore not a proper instruction to the jury. There are no facts from which the jury could have drawn an inference that someone else had possession of the heroin at the pertinent times involved in the two transactions.

The remainder of the instructions at page 69 of the opening brief is so confusing that it is difficult to determine who is being referred to in connection with "acting as a simple intermediary or procuring agent." It is so ambiguous that the instructions could refer to in that context either to the appellant or to the alleged "third person."

The Court instructed the jury: "Now, in this matter of the sale of heroin, if a person far removed from the supply of heroin, either actual or constructive, simply acts as a broker, then that person must have absolute knowledge and control over the situation in order to be so guilty." When considered in connection with instructions given on the

subject of direct and constructive possession, it is clear that the instructions correctly stated the law as applicable to the facts of this case. [Rep. Tr. 435.]

As we have noted above the Court read the presumption [Rep. Tr. 431] which is contained in Section 174 and then went on to state [Rep. Tr. 432] that the jury had to find proof that there was actually a sale, since there was no presumption that there was a sale under each count of the indictment. It was also stated that the presumption only came into play if the defendant was shown by the evidence to have had possession of a narcotic substance.

Judge Tolin then instructed: "Now, possession is sometimes actual, as where a person holds a thing in his hand. Possession in other instances is constructive, as where a person had dominion and control over a thing, having immediate ability to produce, handle or deal with it, but does not actually have it in his own hand." [Rep. Tr. 432, 433.]

It was then said: "Possession must be a *knowing, wilful possession*. No one is to be held to possess a thing, within the meaning of this law, if he doesn't know what he possesses. It is a knowledgable, willing possession which is intended by law." [Rep. Tr. 433.] (Emphasis ours.)

It should be noted that there appears to be no objection made by appellant to the definition of actual and constructive possession.

Counsel for appellant at page 92 to page 96 of his opening brief has cited certain cases in connection with his argument on possession which involve possession of stolen property, possession of a dangerous weapon, and possession of liquor. However, it is to be noted here that this Court in the *Caudillo* case, *supra*, discussed the question of possession and mentioned the *Tot* case. The latter case involved the question of possession of firearm or ammuni-

tion in constituting presumptive evidence that a violation had occurred under the Federal Firearms Act. This Court stated that the difficulty with Caudillo's reliance on the *Tot* case was that it provided no precedent since it was a *factually different case*. Thus it is hard to see how any question of possession could be determined by an analogy to cases involving the possession of liquor or firearms or of any other offense outside of the violation of the law relating to illegal traffic of narcotics.

It is inconceivable that Congress could have had in mind a type of possession which would only be in the hand of the defendant or on his person, that is "actual" possession of the narcotics. This is true because of the well known facts surrounding the devious fashion used by those who negotiate for the illicit sale of heroin. None of the persons who engage in this traffic wish to be caught with the narcotics in their hand and devise many different schemes for delivery of heroin by placing it at curbs or behind bushes or underneath trees or underneath the wheels of automobiles. It is difficult to comprehend how anyone could seriously contend that actual possession in the hand of the defendant would be necessary before a conviction, using the rule of evidence contained in the presumption, could be obtained. If that were true, a "drop" underneath or beside or behind a convenient landmark would be sufficient to put the Government on proof of implication and knowledge thereof. It is ridiculous to say that Congress should intend that such an obvious device, one used commonly in the illegal traffic of narcotics, should be without the purview of the presumption.

In *Brown v. United States*, 222 F. 2d 293 at 297, this Court said:

"In *Mullaney v. United States*, 9 Cir., 1936, 82 F. 2d 638, 642, this Court approved an instruction of the trial court that 'possession of a thing means having

in one's control or under one's dominion.' It is not necessary that possession be immediate or exclusive. *Mullaney v. United States, supra*; *Borgfeldt v. United States*, 9 Cir., 1933, 67 F. 2d 967."

(e) The Trial Judge Adequately Instructed the Jury on the Credibility of the Appellant as a Witness on His Own Behalf.

The government calls the court's attention again to the fact that the court instructed the jury at the inception of his charge "Hence, I cannot say to you properly that the defendant is thus and so, saying guilty or not guilty. That is for you to say. I cannot properly say to you such and such a witness is not to be believed and such a witness is to be believed. Those are questions for you." [Rep. Tr. 419-420.]

The entire instruction on witnesses, part of which was not included in Appellant's Opening Brief, is as follows:

"Witnesses who come to the witness stand and are sworn are presumed to testify to the truth, but that presumption may be overcome by anyone of many things. It might be overcome simply by the manner in which a witness testifies, the manner in which the witness acts. The jury is here to observe the witnesses, to size them up, to determine which ones are creditable and entitled to belief and which ones are not. The jury should look to whether the witness' testimony is consistent, whether it holds together, whether there are contradictions in it, whether the testimony of a witness harmonizes with other evidence which you accept or whether it is in contradiction to other evidence which you accept.

"The defendant is like any other witness. You should not judge his testimony by any other standards.

“But as to all witnesses, look to see what their interest is in the case. Look to see any point of vantage in observing what they claim to have observed. Look to see what they have to gain or to lose by the testimony which they have given. Consider their hopes, their fears, their purposes of justification, their power of observation, how it was applied, their honesty, their integrity. You may consider also whether or not they have been convicted of a felony.

“But all these things come down to simply providing for the jury a means by which you analyze the testimony of the witnesses.”

It was clear that the defendant was not singled out in the instructions, but the judge was cautioning the jury on the criterion to use in judging *every* witness. The cases set forth by appellant do not apply to the facts of this case. For instance, in quoting from the *Malaga* case at page 131 of the opening brief, reference was made to a statement of facts obviously not in evidence, since an argument had been made there with respect to facts which were not in the record, to an “argumentative discourse, a repeated assertion that the respondent or other witness is not telling the truth, or a direct or indirect instruction that a respondent in a criminal case is guilty.” However, all these things are completely outside of the instructions which were given by Judge Tolin. The jury was not told that Bradford’s testimony was inherently improbable or that it was obviously corrupt or false. This is a sheer exaggeration of the actual facts. The court did not surround the defendant’s testimony with “an aura of suspicion,” but, in effect, told the jury to use their common sense in using all of the considerations named in evaluating the testimony of the defendant and “all witnesses.”

(f) The Trial Judge Did Not Wrongfully Refuse to Instruct the Jury on Failure to Produce a "Material" Witness.

In connection with this point, appellant has based his entire argument on two erroneous assumptions. First of all, that the person named "Bobbie Hawkins" was a *material* witness and secondly, that a showing had been made by appellant at the time of trial that the defense could not locate this person.

Considering the last assumption first, it must be kept in mind that it does not appear the defendant testified or offered any evidence to show that a search had been made on his behalf or by him for Barbara Hawkins and that such effort had been futile. The only statement was one made by appellant sitting at counsel table wherein he interrupted Government Counsel's closing argument by saying from the table where he was sitting "I tried to find her, but I couldn't." [Rep. Tr. 408-409.] This outburst at the close of the case could not be accepted as any showing on appellant's part as to the unavailability of the witness to the defense. The affidavit attached to the Opening Brief before this court is improperly submitted as a part of the record since a showing had to be made during the trial itself of any search, and the adequacy thereof, for a "material" witness.

It will be noted that some mention was made of Barbara Hawkins in connection with the defense of entrapment out of the hearing of the jury. [Rep. Tr. 112.] Judge Tolin stated to him "If you desire the presence of that person as a witness I will issue a Writ of Habeas Corpus Ad Testificandum to compel the presence of that person in court." [Rep. Tr. 113.]

No request was ever made by appellant for such a writ for the presence of "that person" in court as a witness.

Any time spent in arguing the trend of authority in presumptions where a "material" witness is not produced at trial is to of no avail when there is no showing that the witness was "material." The proposed instruction makes the same blunder in that the witness was not material at all.

There was no contention in the argument, nor was it developed through the evidence, that Barbara Hawkins did more than introduce appellant and Agent Farrington. All of the other transactions which were vital in the within trial were outside of the presence of Barbara Hawkins and at some distance from her residence. This is true also of all of the conversations which took place in connection with these transactions. Upon examining the transcript [250-253], counsel was aiming the entrapment defense solely at Agent Farrington, who was then using the name of "Ben." For instance, the statement was made that certain things were done by the appellant "* * * at the instigation and direction of 'Ben' * * *" [Rep. Tr. 251.] It is apparent that appellant has taken an entirely different tack in his opening brief with respect to the alleged material witness, Barbara Hawkins, than he originally did in trial and one which is not warranted by the evidence.

The defendant took the stand and testified in his own behalf with respect to his version of the original meeting with Agent Farrington, among other things. He stated that they met at the Bobbie Hawkins apartment where the agent was introduced to him as "Ben Allen." There was no contention by the defendant himself that anything further was said much more than "general conversation; an introduction." It appears from the remainder of the transcript, including the rest of the defendant's testimony that there was no other evidence that she had anything further to do with the transaction between appellant

and the agent than the introduction which was made in her apartment. In other words, they were free of any participation of the person called Barbara Hawkins.

There is absolutely no showing of any facts which would cause this Court to say that the Government had refused to call a material witness and the instructions involving this refusal had been in error. There is no showing that the Government could have anticipated that the witness would be necessary to either party at the trial or that, as stated above, the appellant could not have found her. The affidavit which is attached to the opening brief would not now afford the Government an opportunity to bring the witness into court to testify; but, the important point is that the witness was not "material."

4. No Misconduct Was Committed by the Assistant United States Attorney.

(a) No Error Was Committed During the Government's Closing Argument.

The Government calls the Court's attention to a part of the closing argument which is not contained in defendant's opening brief. Government counsel stated:

"The Government is not contending that because the subject matter of the case is narcotics, that that alone is sufficient to warrant a conviction. That is, of course, not true. What the Government contends in this case is that the facts so inescapably lead to the conclusion that the defendant is guilty as charged in both counts that there is no real issue." [Rep. Tr. 379.]

Later, during the closing argument, Government counsel said:

"The Government welcomes the burden of proof which the law places on us, which is to prove the

defendant guilty beyond a reasonable doubt. The reason I mentioned that, ladies and gentlemen, is because in this case, there is no doubt, there is absolutely no doubt under the evidence that this defendant sold those narcotics and that he had possession of them.” [Rep. Tr. 409.]

Subsequently, Government counsel also stated:

“* * * He is guilty under the indictment, ladies and gentlemen, and counsel had admitted he is morally guilty. The Government says he is also *guilty under the law*.” [Rep. Tr. 412.]

It was then stated, as indicated and objected to in Appellant’s Brief, that:

“* * * *in this particular case*, ladies and gentlemen, it is submitted *that the facts that have been given to you from the witness stand*, that if your verdict is not guilty on each count, there would be a travesty of justice.”

Government counsel went on:

“*talking about the facts of this particular case*, ladies and gentlemen, if your verdict, *under the circumstances which have been testified to in this court on this case*, is not guilty, ladies and gentlemen, the effect of the law will be nil completely. Absolutely, it will end federal control of narcotics.”

During the entire extent of Government opening and closing argument there was no language such as quoted in the opening brief in connection with certain remarks which have been held prejudicial during argument in other cases. There was no appeal to the jury that if they went home, their neighbors would feel they had been bribed or otherwise importuned to return a certain type of

verdict. There was nothing said that if the verdict in the case was not guilty, regardless of the facts of the case, the control of narcotics would be gone. It was not suggested that the importance of control of the illegal traffic of narcotics was such that the defendant should have been found guilty regardless of the evidence in the case. The only statement that was made was that *under the facts of the case*, the verdict should have been one of guilty. The whole gist of the argument to which appellant had complained was that the *evidence in the case showed the defendant to be guilty* beyond any reasonable doubt. During our argument, the burden of proof was carefully pointed out to the jury and the facts were called to their attention that the defendant had been extremely well represented by counsel and that he had apparently been afforded a fair trial. There was no appeal to passion or prejudice or emotionalism made to the jury, at least during Government counsel's argument.

It is to be noted that in connection with the alleged misconduct of Government counsel in connection with the closing argument, Judge Tolin stated in answer to this complaint.

"Do you think the jury understood that is what she was saying, that the whole federal system of enforcement of narcotic laws would fall unless this man were convicted?"

"She had not contended that he was the pivotal figure in the entire fabric of narcotics vending in the United States. I think what she was undertaking to say—and what the jury understood she was undertaking to say—was that if a case with evidence as substantial as the evidence in this case is, is not worthy of conviction, then no case brought under this statute is. And the evidence in this case was certainly abundant."

After that was said, the counsel for appellant stated that it had been a close case in his opinion. [Rep. Tr. 455-456.] Judge Tolin then went on to say in connection with that remark and the part of the closing argument which has been objected to:

“It was a little enthusiastic, Mrs. Bulgrin. It would have been better to have not included it, I think, as a matter of taste, rather than of importance on the legal side of the case or consideration of the factual.

“But, I undertook to thoroughly instruct the jury. And I can’t see any point in the statement it was a close case. The jury was out about—was it four hours?”

Judge Tolin then later went on to say:

“It has been my experience as a Trial Judge that the juries rarely return verdict in less than four hours.” [Rep. Tr. 467.]

(b) The Assistant United States Attorney Did Not Commit Misconduct by an Interruption of Appellant’s Opening Statement to the Jury.

At the beginning of appellant’s case, his counsel elected to make an opening statement. After he had made certain remarks with respect to the lawful importation of opium, the lawful manufacture of morphine, the synthesization of morphine and heroin and certain other matters, Government counsel interrupted him to state to the Court that the opening statement for defendant seemed to pertain to matters of law which were argued before the Court in connection with a constitutional objection previously presented. We contended that they were not proper considerations for the jury. [Rep. Tr. 244-246.] The Court stated that the defendant was not arguing the constitutionality of the section and defense counsel stated that he

did not mean to be making such an argument. Both of these statements were made in the presence of the jury. The Court subsequently commented:

“Maybe he is going to have a whole chain here with many links in it, and if so, he is entitled to describe each link.

“So far, the opening statement has tended to be the description of one link in what might possibly be a chain; I can’t tell. He has the floor. I am going to let him continue.”

Government counsel was obviously overruled on her contention in front of the jury and the Court permitted counsel to continue with his argument. During the colloquy between Court and counsel, it was apparent that the Government’s objection was merely based upon the fact that these were matters to be presented to the Court outside of the presence of the jury. This contention was rejected in the presence of the jury and could have lead to no other inference but that the appellant had the right to continue with his theory of defense, which the opening brief states he was outlining as matters which would be developed in the trial. It is difficult to understand how appellant can contend that any of the remarks which were made in this particular instance were of any prejudice to the defendant, or, in fact, were in error at all. The matter was resolved favorably to the appellant and the plain implication was that he could continue with the trend of his statement. Perhaps, with hindsight, the interruption should not have been made, but, as the Court stated, it was not serious. The other remarks of the Court [Rep. Tr. 248] with respect to the advisability of the interruption or the development of the statement were made outside the presence of the jury. However, it was obvious that defense counsel could continue to the extent he thought proper.

Conclusion.

In conclusion, it is submitted that the verdict below should be affirmed. The Trial Judge did not err in denying the Motions for Judgment of Acquittal. The Government will not repeat any of the above matters again which would be in support of the denial of said motions but will only state that, not only was the Court entitled to construe the evidence most favorable to the Government in considering such motions, but under the law was warranted in the denial.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
*Assistant U. S. Attorney,
Chief, Criminal Division,*

LEILA F. BULGRIN,
*Assistant U. S. Attorney,
Attorneys for Appellee, United
States of America.*

No. 15625✓

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GIUSTINA BROS. LUMBER CO.,
Respondent.

Transcript of Record

Petition to Enforce An Order of the National
Labor Relations Board

FILED

OCT 15 1957

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT No. 1-M

United States of America
Before the National Labor Relations Board
Nineteenth Region

Case No. 36-CA-633

GIUSTINA BROS. LUMBER CO. and LOCAL
2611, LUMBER AND SAWMILL WORK-
ERS, AFL

AMENDED COMPLAINT

It having been charged by Local 2611, Lumber and Sawmill Workers, AFL, hereinafter referred to as the Union, that Giustina Bros. Lumber Co., hereinafter called the Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act as amended, 61 Stat. 136, hereinafter called the Act, the General Counsel of the National Labor Relations Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Amended Complaint and alleges as follows:

I.

Giustina Bros. Lumber Co. is a corporation organized and existing by virtue of the laws of the State of Oregon, having its principal offices and place of business in Eugene, Oregon, and is en-

gaged in the processing of lumber and lumber products.

II.

In the course and operation of its business, Respondent produces and ships in commerce among the several states of the United States, other than the State of Oregon, its products valued in excess of \$100,000.00 annually.

III.

The Union is, and at all times material herein has been, a labor organization within the meaning of Section 2 (5) of the Act.

IV.

The following unit is now, and at all times material herein has been, an appropriate unit within the meaning of Section 9(b) of the Act:

All employees at the Respondent's sawmill and planing operations in Eugene, Oregon, and the log dump and pond located at Springfield, Oregon, excluding office and professional employees, guards, and supervisors as defined in the Act.

V.

The Union is, and at all times material herein has been, the exclusive bargaining representative of a majority of the employees within the meaning of Section 9(a) of the Act in the unit as set forth in paragraph IV above for the purposes of collective bargaining.

VI.

The Union, on or about June 21, 1954, instituted

strike action against Respondent for economic objectives.

VII.

Respondent, by its officers, agents, and supervisors, while engaged in the operations described above in paragraphs I and II, has, since on or about July 28, 1954, engaged in activities which interfered with, restrained and coerced its employees, and is now engaging in such activities by:

(a) Urging and persuading its employees to desist from the strike in which they were then engaged, and to return to work under conditions to be mutually arrived at between Respondent and its individual employees, thereby by-passing their collective bargaining representative.

(b) Mailing to its employees who were then on strike a letter, a copy of which is appended hereto and marked Exhibit A.

(c) Refusing, on or about August 31, 1954, to bargain with the Union as the representative of the employees as detailed below.

(d) Unilaterally terminating, on or about September 2, 1954, the collective bargaining agreement then in force between the Union and the Respondent.

VIII.

Respondent, by its officers, agents and supervisors, while engaged in the operations described above in paragraphs I and II, has failed and refused to bargain in good faith with the Union as

the exclusive representative of all its employees in the unit described above by:

(a) Meeting with its employees on or about July 28, 1954, and urging them to return to work under conditions to be arranged between the employer and the employees, individually, without dealing directly with the Union, their representative, thereby discrediting and by-passing the Union.

(b) Refusing, on or about August 31, 1954, to bargain with the Union as the representative of its employees for the alleged reason that a question concerning representation existed, although Respondent was well aware at the time that no question concerning representation did, in fact, exist in that Respondent was party to a contract then in existence which barred any representation matter before the National Labor Relations Board.

(c) Notifying the Union, on or about September 20, 1954, that the collective bargaining agreement between the Respondent and the Union was terminated.

IX.

By the acts described above in paragraphs VII and VIII, and by each of them, and for the reasons therein set forth, Respondent interfered with, restrained and coerced its employees in the exercise of their rights guaranteed by Section 7 of the Act, and by all of said acts, and each of them, Respondent has engaged in, and is now engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

X.

By the acts described above in paragraph VIII, and by each of them, and for the reasons therein set forth, Respondent did refuse and fail to bargain with the Union as the representative of its employees in the appropriate unit as set forth in paragraph IV above, and thereby has engaged in, and is now engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

IX.

By the action and conduct of Respondent alleged in paragraphs VII and VIII above, and by such action and conduct the strike action of the Union was converted to an unfair labor practice strike, and was thereafter extended and prolonged until terminated by the Union on Jan. 19, 1955.

XII.

On January 19, 1955 the Union unconditionally requested of Respondent immediate reinstatement of the employees hereinafter named to their employment status with Respondent, Respondent then, and at all times since, refused and now refuses to reinstate said employees to their former or substantially equivalent employment:

Bearden, John Bellmore, Gene Blanton, Orville Bloom, Charles Bogart, G. P. Bowers, R. L. Breckwig, Brink, Wallace Brock, Brooks, Billy Brown, E. Brown, Denver Bruce, Melvin Bryant, Roy Buel, Frank Butenscheon, Brock.

John Carlson, W. G. Carpenter, George Casper,

Iley Casteel, Loyal Caudle, Glenn Clark, Ray Cook, Arthur Cornwall, Floyd Cox.

Frank Dietz, Ray Dilbeck, Otis Driggs.

Charles Eaton, David Edmon, Frank Elliott, Eylar Erickson, Joe Evoniuk.

Fitzpatrick, De Franks.

Jack Gandy, Gentry, Goldenberg, Gray, Edgar Greenhoot, Albert Gregg, Dale Gregg, Ross Gregg, Vernon Gregg, Gutbrod.

Martin Hagg, Halpain, Elmo Harmon, Ed Hassett, John Hedegaard, Bernard Hempel, H. T. Hendricks, W. R. Hicks, O. D. Hodge, William Hopson, Huber, Leroy Huffman.

Alvin Jackson, Arthur Jones.

Lawrence Keopka, Earl Kynard.

A. J. La Cross, Lambert, Delbert Lawson, John Lawson, Samuel Lebow, Charles Lemmer, Lloyd, Bomer Long.

Roy Markwell, William McNair, John Malpass, Robert Matthews, Walter Mayo, Clair Meade, H. M. Meadows, Vaughn Meskimen, Merlyn Mikkelsen, Virgil Miller, Fred Molinda, J. Moore, P. Mullin, Stanley Mortenson.

Earl Nash, Roy L. Noble, Roy Noble, Fred Nichols.

Harold Olsen.

William Palmer, Henry Pappel, Richard Parent, J. H. Paris, Paul Parker, P. Peterson, John Phillippe, John Pickett, Leonard Pike, Maurice Potter, Clarence Price.

Glen Rasmussen, Richard Reinking, Reed, Verlin Rice, James Richards, Donald Roupe.

Robert Scarlett, Thurman Scevins, Scheid, Elmer Schlafer, Harold Sederlin, Anthony Smith, Lewis Smith, Snyder, Dean Sparks, Date Strehlow.

Tribe.

Vladik.

O. D. Walker, Al Warren, Darwin Watts, Eugene Watts, Ed Williams, James Williams, Joe Williams, Charles Windham, Louis Wright.

Joe Yates, Harold Yancy, Richard Yoder.

Alex Zarzan, Ed Zietner, Johnny Zybach.

XIII.

By the action and conduct of Respondent in terminating and discharging its respective employees named in paragraph XII above, in the manner and for the reasons stated in paragraphs VII, VIII and XI above, Respondent discriminated in regard to the tenure of employment of said employees, discouraged membership in the Union and discouraged concerted action and participation in unfair labor practice strike action, and has been and is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

XIV.

The activities of Respondent as set forth and described above in paragraphs VII through XIII, occurring in connection with the operations of Respondent as set forth and described in paragraphs I and II above, have a close, intimate, and sub-

stantial relation to trade, traffic and commerce among the several states of the United States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XV.

The aforesaid acts of Respondent constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1),(3) and (5), and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 19th day of April, 1955, issues this Amended Complaint against Giustina Bros. Lumber Co., the Respondent herein.

[Seal] THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
19th Region.

EXHIBIT A

Giustina Bros. Lumber Co.

Eugene, Oregon

5-August 1954

To: The Employees of Giustina Bros. Lumber Co.

Operations at our plant in Eugene were resumed July 29, 1954. Some of you have not returned to work. We plan to continue our Eugene operations. If you have not returned to work by Monday, August 9, 1954 to start the regular day shift, it will

be considered that you have severed your employment and we will look to others to fill the jobs.

Yours very truly,

GIUSTINA BROS. LUMBER CO.

N. B. GIUSTINA

N. B. Giustina

NBG/gg General Manager

GENERAL COUNSEL'S EXHIBIT No. 1-Q

[Title of Board and Cause.]

ANSWER

Giustina Bros. Lumber Co., for answer to the amended complaint herein, admits, denies and alleges as follows:

I.

Admits paragraphs I, II, III and IV.

II.

Answering paragraph V, Respondent admits that prior to June 21, 1954, union was a collective bargaining representative of the employees within the units set forth in paragraph IV. Save and except as expressly admitted herein, Respondent denies each and every allegation contained in said paragraph.

III.

Admits paragraph VI.

IV.

Answering paragraph VII, Respondent admits that it mailed a copy of the letter attached to the complaint as Exhibit A. Save and except as expressly admitted herein, Respondent denies each and every allegation contained in said paragraph.

V.

Answering paragraphs VIII, IX, X and XI, Respondent denies each and every allegation contained in said paragraphs and the whole thereof.

VI.

Answering paragraph XII, Respondent admits that it has refused to reinstate certain persons to their former employment. Save and except as expressly admitted herein, Respondent denies each and every allegation contained in said paragraph.

VII.

Answering paragraphs XIII, XIV and XV, Respondent denies each and every allegation contained in said paragraphs and the whole thereof.

And for a separate answer to the amended complaint herein, Respondent alleges that after July 15, 1954, a question existed as to whether Local 2611 represented a majority of the employees within the bargaining unit as set forth in paragraph IV of the amended complaint; that a group of employees filed their petition with the National Labor Relations Board asking that an election be held to decertify said local union No. 2611 as a collective bargaining agency of said employees;

that after August 11, 1954, the majority of the employees in said bargaining unit worked regularly at Respondent's sawmill and planing operations in Eugene, Oregon, and the log dump and pond located at Springfield, Oregon, even though Local 2611 at all said times and until January 19, 1955, maintained a picket line at said sawmill and planing operations.

And for a further answer to the complaint herein, Respondent alleges that the strike called by Local Union No. 2611 was a breach of the labor agreement between Respondent and said local; that following said breach, Respondent gave notice of termination of notice of said contract and that said strike and picket line maintained by Local 2611 was in violation of the terms of said collective bargaining agreement and constituted an unfair labor practice within the meaning of the Act.

Wherefore, having fully answered the amended complaint herein, Respondent prays that the same be dismissed and for such further relief as may be appropriate in the premises.

/s/ RICHARD R. MORRIS,

Attorney for Respondent.

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 1-R

[Title of Board and Cause.]

AMENDED ANSWER

Giustina Bros. Lumber Co., for amended answer to the amended complaint herein, admits, denies and alleges as follows:

I.

Admits paragraphs I, II, III and IV.

II.

Answering paragraph V, Respondent admits that prior to June 21, 1954, union was a collective bargaining representative of the employees within the units set forth in paragraph IV. Save and except as expressly admitted herein, Respondent denies each and every allegation contained in said paragraph.

III.

Admits paragraph VI.

IV.

Answering paragraph VII, Respondent admits that it mailed a copy of the letter attached to the complaint as Exhibit A. Save and except as expressly admitted herein, Respondent denies each and every allegation contained in said paragraph.

V.

Answering paragraphs VIII, IX, X and XI, Re-

spondent denies each and every allegation contained in said paragraphs and the whole thereof.

VI.

Answering paragraph XII, Respondent admits that it has refused to reinstate certain persons to their former employment. Save and except as expressly admitted herein, Respondent denies each and every allegation contained in said paragraph.

VII.

Answering paragraphs XIII, XIV and XV, Respondent denies each and every allegation contained in said paragraphs and the whole thereof.

And for a separate answer to the amended complaint herein, Respondent alleges that after July 15, 1954, a question existed as to whether Local 2611 represented a majority of the employees within the bargaining unit as set forth in paragraph IV of the amended complaint; that a group of employees filed their petition with the National Labor Relations Board asking that an election be held to decertify said local union No. 2611 as a collective bargaining agency of said employees; that after August 11, 1954, the majority of the employees in said bargaining unit worked regularly at Respondent's sawmill and planing operations in Eugene, Oregon, and the log dump and pond located at Springfield, Oregon, even though Local 2611 at all said times and until January 19, 1955, maintained a picket line at said sawmill and planing operations.

And for a further answer to the complaint herein, Respondent alleges that the strike called by Local Union No. 2611 was a breach of the labor agreement between Respondent and said local; that following said breach and on or about September 2, 1954, Respondent mailed to Union a letter, a copy of which is attached to General Counsel Exhibit No. 2, marked Appendix K; that on or about September 13, 1954, Local Union 2611 mailed to Respondent a letter, a copy of which has been introduced in evidence as General Counsel Exhibit No. 4; that on or about January 13, 1955, Respondent mailed to Union a letter, a copy of which is attached hereto, marked Exhibit No. 1; that on or about January 18, 1955, Union mailed to Respondent a letter, a copy of which is attached hereto, marked Exhibit No. 2; that on or about January 25, 1955, Respondent mailed a letter to the Federal Mediation and Conciliation Service, a copy of which is attached hereto, marked Exhibit No. 3; that on or about January 25, 1955, Respondent mailed to the Oregon Board of Arbitration a letter, a copy of which is attached hereto, marked Exhibit No. 4; and that said strike and picket line maintained by Local 2611 was in violation of the terms of said collective bargaining agreement and constituted an unfair labor practice within the meaning of the Act.

Wherefore, having fully answered the amended complaint herein, Respondent prays that the same

be dismissed and for such further relief as may be appropriate in the premises.

/s/ RICHARD R. MORRIS,
Attorney for Respondent.

Duly Verified.

EXHIBIT No. 1

(Copy) Giustina Bros. Lumber Co.
Eugene, Oregon

Local #2611, LSW-AFL January 13, 1955
480 Horn Lane, Eugene, Oregon
Attention: Mr. Leland James Howden

Gentlemen:

Under date of 2 September 1954 we notified you that a contract between you and Giustina Bros. Lumber Co. dated 8 May 1953 covering our saw-mill and planing operations in Eugene, and the log dump and pond in Springfield, was terminated. Thereafter you wrote us that you did not consider the contract at an end.

In order that there may be no doubt, you are hereby notified that we reaffirm our notice of termination of that agreement.

Yours very truly,

GIUSTINA BROS. LUMBER CO.

Sam E. Hughes.

SEH/gg

cc: Mr. Richard Morris
Attorney-at-Law

EXHIBIT No. 2

(Copy)

Local Union No. 2611

480 Horn Lane,

Eugene, Oregon

Giustina Bros. Lumber Co.

January 18, 1955

P. O. Box 989, Eugene, Oregon

Gentlemen:

In reply to your letter of January 13, 1955 in which you reaffirm your position of September 2, 1954.

We reaffirm our position stated on September 13, 1954. The collective bargaining agreement can be terminated only in accordance with the provisions of Article XIII. The agreement therefore remains in effect.

Yours truly,

/s/ LELAND JAMES HOWDEN,

Leland James Howden, Business Agent, Local
Union No. 2611, Lumber & Sawmill Workers.

GENERAL COUNSEL'S EXHIBIT No. 2

[Title of Board and Cause.]

STIPULATION OF THE RECORD

It Is Hereby Stipulated and Agreed by and between Giustina Bros. Lumber Co., hereinafter called Respondent, acting by and through Richard R. Morris, its attorney, and Local 2611, Lumber and Sawmill Workers, AFL, hereinafter called the Union, acting by and through Donald S. Richard-

son, its attorney, and the General Counsel of the National Labor Relations Board, acting by and through Patrick H. Walker, its Counsel, as follows:

I.

Upon charges filed by the Union on August 2, 1954, and served upon the Respondent on August 5, 1954, and upon amended charge filed on September 15, 1954 and served upon the Respondent on September 16, 1954, and a second amended charge filed January 27, 1955 and served January 29, 1955, receipt of each of which is hereby acknowledged by said Respondent, the General Counsel of the Board, on behalf of the Board, by the Regional Director for the Nineteenth Region of the Board, acting pursuant to authority granted by Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, and pursuant to the Board's Rules and Regulations, Series 6, as amended, Section 102.15, duly issued a Complaint and Notice of Hearing thereupon on December 20, 1954 against the Respondent herein, and an amended complaint and further Notice of Hearing dated April 19, 1955, receipt of each of which is hereby acknowledged.

II.

Giustina Bros. Lumber Co. is a corporation organized and existing by virtue of the laws of the State of Oregon, having its principal offices and place of business in the City of Eugene, Oregon, engaged in the processing of lumber and lumber products.

III.

In the course and operation of its business, Respondent produces and ships in commerce among the several states of the United States, other than the State of Oregon, its products valued in excess of \$100,000.00 annually.

IV.

Respondent is and at all times material herein mentioned has been an employer within the meaning of Section 2(2) of the Act and engaged in interstate commerce within the meaning of Section 2(6) and (7) of the Act.

V.

The Union is and at all times material herein has been a labor organization within the meaning of Section 2(5) of the Act.

VI.

The following unit is now and at all times material herein has been an appropriate unit within the meaning of Section 9(b) of the Act:

All employees at the Respondent's sawmill and planing operations at Eugene, Oregon, and the log dump and pond located at Springfield, Oregon, excluding office and professional employees, guards, and supervisors as defined in the Act.

VII.

On or about the 8th day of May, 1953 Respondent and the Union entered into a revised agreement, a copy of which is attached hereto and marked Appendix A.

VIII.

At all times material herein Respondent has been a member of Willamette Valley Lumber Operators Association, herein called Association, and the Union has been affiliated with Willamette Valley District Council of Lumber and Sawmill Workers, herein called Council.

IX.

Association is a corporation organized under the laws of the State of Oregon relating to non-profit corporations. Its members are limited to those who are engaged in a forest products industry. From time to time members of the Association delegate limited authority to a committee composed of members of the Association to negotiate with the bargaining agents of their respective employees.

X.

Council is an unincorporated association of local labor organizations, including the Union, and is chartered by the United Brotherhood of Carpenters and Joiners of America, and at all times material hereto has been and is now engaged in promoting and protecting the interests of employee members of its constituent local unions, more particularly it has represented its constituent locals in labor disputes and in collective bargaining with Association and with the members of Association.

XI.

On or about February 10, 1954 Council executed

and delivered to Respondent a letter. On or about February 20, 1954, by letter, Respondent replied. On or about March 10, 1954 the Union wrote and delivered to Respondent a further letter. On April 9, 1954, Council wrote and delivered to Respondent a letter to which Respondent replied by letter on April 13, 1954. A copy of each of the above described letters is annexed hereto, marked respectively Appendix B, C, D, E, and F, and by reference incorporated herein. Negotiations between a committee of Association and Council thereupon occurred on April 28, June 17, July 13 and August 4, 1954.

XII.

On or about June 21, 1954, the Union undertook strike action and picketing against Respondent in furtherance of its wage demands.

XIII.

On or about July 24, 1954, various non-supervisory employees of Respondent employed in the unit set forth above, met at the home of one of said non-supervisory employees. About 35 non-supervisory employees attended the meeting. At that meeting the employees present discussed petitioning the Union for a meeting and seeking to have the bargaining rights returned from the Council to the Union, and failing in achieving that purpose to try to return to work at the plant of Respondent even though pickets were maintained at the plant.

A meeting of the members of the Union was

held the night of July 28, 1954. About ten of the above non-supervisory employees met on July 28, 1954, before the Union meeting. At that meeting this group again discussed the question of withdrawing authority from the Council, and if they were unsuccessful, they would go back to work.

At that Union meeting no action was taken to return the bargaining rights to the Union. Following the Union meeting some of the above non-supervisory employees of Respondent in the bargaining unit met outside the Union Hall to discuss their problems. One of said employees suggested that they move the meeting to the parking lot of Respondent. This group of said employees then went to the parking lot of Respondent. When they reached the lot they found that the shop was open. The shop had been used in the past for employee meetings. The group then went into the shop. Officers of Respondent, President Nat Giustina, Ehrman Giustina, and Sam E. Hughes, were then invited to the meeting and attended part of it. No objection was raised by Respondent to holding the meeting on the property of Respondent.

The meeting was attended by at least 22 employees. The number present varied from time to time as various employees came to and left the meeting.

The meeting was opened by Robertson, a non-supervisory employee in the bargaining unit. The following material was spoken by the individual after whose name the comments appear. Where the

speaker is unidentified, he is not an officer or supervisory employee of Respondent.

Robertson: You know why you are here. I called the bosses and they'll come down and you can ask them anything you want.

Robertson then called Hughes, and Hughes, Nat and Ehrman Giustina came to the meeting.

Robertson: Before we start, I think there are a few here who shouldn't be here. Sam and Ehrman, will you come over here a minute?

Robertson asked Hughes if he would talk to the men. Hughes, not recognizing some of the men, said:

Hughes: Were you boys invites?

Louis Wright: Sure, Johnson invited us, didn't you, Johnson?

Johnson: Yeah, I invited them.

Hughes: Was everybody at the Union meeting invited?

Wright: No, if you guys had just had every guy invite one more guy you would have had twice this representation.

Hughes: Before we go any further, I want to state that it is my opinion anyone has a right to present his individual grievance providing the collective bargaining agent has had an opportunity to be present and I'm wondering if Howden knows about this meeting and has had an opportunity to be present if he desires.

Unidentified: He could have come if he had wanted to.

Zybach: Was Howden invited?

Hughes: I don't know. Was he?

Robertson: I suggest we start it off by letting some of the fellows talk who are new to this idea and haven't been thinking about it very long.

Hughes: Have you men got anything to say?

(No answer.)

Hughes: Very well. I sincerely hope that none of you have come here with the intention of just listening to what is going on and then reporting it back to the hotshots. There's an operation up near Bellfountain where they had a couple of men who ran to the District Council every time they heard something; they have a name for those fellows, they call them rats. I hope none of you are going to be called rats by the fellows you work with. Now, if any of you want to leave I'm sure it will be satisfactory to everyone else. Well, I'm sure I don't need to tell you what will happen to you in the future.

Robertson: Anybody who don't want to go to work (waving at the door).

Hughes: Very well, we will assume everyone here feels as you do. Now, in the first place, fellows, I'm not here to knock your Union. I think its done the people of Willamette Valley a lot of good, and I know that the people I work with (indicating Nat and Ehrman Giustina) feel the same way. We are not out to break the Union. I cannot state that too emphatically — we do not want to break the Union. We think its done a fine job and

we want it to keep on doing it. We have a lot of respect for it. Nat and Ehrman have belonged to it; and their father belonged to it before them a lot longer, I imagine, than most of you fellows have.

But while the Union leadership has a very worthwhile duty to perform, it also has a tremendous responsibility—tremendous responsibility. In fact, I wouldn't be in their shoes for anything in the world. Any time two or three men can sit up there and dictate the lives of . . . thousand men, they have a tremendous responsibility. Any time two or three men can tell that many thousand men whether they can work to feed their families or not, they have a terrible responsibility.

Now, while these two or three men up there in this position of power can do a mighty worthwhile job, they also have to be conscious of their responsibility. They have to do this job right. At the present time, they have all these thousands of men sitting on their backsides with their families going hungry on a strike that is entirely uncalled for. This strike is costing you men . . . dollars a day and for what? Not for twelve and one-half cents an hour. All the companies that have settled thus far have settled for five cents or less. In fact, actually, most of them have settled for nothing. Take Woodard's down here at Cottage Grove. All they did was to lower wages three cents and then give a five cent raise.

Now, that's just like taking a quarter out of this

pocket and putting it into this pocket (demonstrating . . .). You could do that, I can do it. Our management could do that. We could lower your wages five cents and then offer you a five cent raise and have you back on the job. But we are not going to do that. We are going to be honest with you. We are not going to make an offer, and we are not going to try to make you think you are getting something when you are actually getting nothing. That is not the way we operate. We are going to lay the cards flat on the table.

We realize the Union has been telling you how the lumber market has been going up and how we are making money hand over fist and this and that. But let me tell you, fellows, this lumber market is no cinch. Sure, lumber has gone up but only in a few kinds of lumber. Green has gone up; now that the strike's on, but what about before that. You boys saw it. We had to pull some kinds of logs over in the corner of the pond. We just couldn't afford to saw them. Now take the stuff we make, your high grade finish. You saw how it piled up in the sheds. There was just no market for it. In the stuff we make, the price stayed down.

The people who are really doing all right now are the little gypos like Blue River across the street. They've been shut down for a long time but they began running again the morning the strike started. They've even put on a night *shirt* now. If we were going to do business that way, start and stop depending on the market, why maybe we could

see our way clear to make a wage increase. We think its more important to be able to keep a good crew like we have by paying a fair wage and providing steady work. Most of you men must feel the same way or else you'd be working for some of these gypos that stop and start with the market.

Now, fellows, I know that I've done a very poor job in informing you of the real situation we're in. I know that management, in general in the Willamette Valley has done an awfully poor job of keeping you informed as to your individual rights and liberty to do as you want.

Remember, as I've told most of you while you were on picket duty, generally a man has a right to strike or not to strike as he sees fit, to engage in concerted activities such as a strike or refrain from them, and neither the Union nor the employer can discriminate against the man for his actions. The Taft-Hartley Act is your protection and provides this and is still the law of the land. In the first place, the Union cannot keep you from working if you want to.

Nat Giustina: Just a minute, Sam. I would like to put a word in here. Men, you have your individual rights. The Constitution of the United States is a lot stronger than any union. This is still America.

Unidentified: Up at the Union meeting awhile ago, we thought it was Russia.

Unidentified: Yes, they wouldn't let us have the

floor, only for five minutes at a time, but they let Kraal talk about 30 minutes.

Nat Giustina: You have the Constitution of the United States to back you up. Your forefathers and mine came to this country and fought for these rights. Mine might have got here a little late but they all fought for the individual rights of the people. That's why I'm a Republican. I'm probably a black one, too, because I'm for Taft.

It is the rights of the individual that we think is important. Your rights as a man to work where and when you want to. No union can make you go out on strike. On the other hand every man also has the right to strike if he wants to. Any individual working in the mill can go on strike and we can't do one thing about it. He can tell us to go climb a tree. But if he didn't want to strike, nobody can make him. He has a right as an individual to keep on working.

Alldrit: But what about the strike vote?

Hughes: That's a good point, Jack. I'm glad you brought it up. And here I want to say that I don't have much respect for the strike vote. The vote only carried by a small majority.

Alldrit: Two to one.

Hughes: The strike vote carried by a small majority and only about 20% of the men in this plant voted for the strike. Now let's look at that for a minute, say there were about 450 men in the plants represented by Local 2611 that were either union members or eligible for membership. Only

122 men voted on the strike and out of this only 78 voted for the strike and 44 voted against it. That's about 63% for a strike and 37% against it. Now, 82 men from the plant voted and if they voted in the same proportion as I've explained then about 52 voted for the strike and 30 were against striking. This company had about 250 employees represented by a union when the strike started. The 50 odd who we assume voted for the strike are only 20% of our crew and I refuse to believe that this 20% represents the wishes and desires of the 250. However, as far as the company is concerned, we don't have any hard feelings toward anyone here in the plant and as far as I'm personally concerned, I still have a lot of respect for Howden. I think he has tried to do a good job.

Bloom: But if us guys go back to work now, what happens when the strike is over? If you hire the union guys back, what if they won't work with us?

Nat Giustina: If you think we're tough on this strike, try that one.

Unidentified: If we go back to work, we're through with the Union.

Hughes: No, you're not. The Act requires that you tender the periodic dues and initiation fees uniformly required of——

Nat Giustina: Just a minute, Sam, define the word tender.

Hughes: To tender your dues is to offer to pay them. Now all you have to do is to walk up to one

of the committee and offer your money to him. If he doesn't take it, the union can't kick you off the job. In fact, if you had tendered your dues and we fired you because the Union told us to, we would get into trouble. You could sue us for plenty. Orville (turning to Orville Bloom), I'm not going to try to change in a few minutes the idea that the Union has spent years getting into your head but I tell you that we can do absolutely nothing.

Bloom: If we go back now, how about the pay? Would we get the same rate of pay we're getting before the strike?

Nat Giustina: Now, just a word here about pay. The wages, hours and working conditions in effect at the start of the strike would be maintained. Say down here working on the chain we've got a man who builds straight loads and puts stickers in where they belong. Say he works hard and builds a good, solid load. We would like to give that man a raise in pay. He's earned it. But, with the Union in, we can't. You know why? Because if we do we've got to give this other guy working on up the chain, who builds a load that falls down every time you try to pick it up, a raise too. The Union tries to make you all the same like sheep. We would like to pay you men what you're worth, but we can't.

Bloom: What about the other rights and advantages we've gained through the Union? Do we still have them if we go back to work?

Unidentified: Well, the veneer plant is working.

Nat Giustina: Now, just a minute. Just a minute. Look at the veneer. All right, they've got everything you've got, except seniority, and they don't want that. The best man gets the job and they're happier that way. Seniority is out.

Men, you've got the Taft-Hartley Act to protect you. All the Taft-Hartley Act is is an improvement on the Wagner Act. The only difference is this. Where the Wagner Act protected you from the s.o.b. employer, the Taft-Hartley Act protects you from the s.o.b. employer and the s.o.b. union boss.

Unidentified: Well, what we waiting for? Let's get to doing something here.

Unidentified: Why doesn't the District Council want us to go back to work?

Hughes: Now here's what the District Council is worried about. They're not thinking about you men. All they're worried about is that four dollars a month.

Eight hundred dollars a month, nine hundred dollars. That's right. All they're worried about is their nine hundred dollars a month. That's what they take out of this plant. They're just thinking about their jobs. You'd do the same thing probably, if you were in their shoes. All they're worried about is their jobs.

Unidentified: All we're thinking about is our jobs. If they can think about their jobs, why can't we think about our jobs.

Nat Giustina: That's it. That's the whole thing right there.

Bartunek: Why can't we withdraw from the District Council.

Marvin: Or better still, why can't we form a new union all our own with just us men?

Hughes: Now, just a minute. Pardon me, Nat, let me say a few words just here. This is not the time nor place to discuss anything like that.

Unidentified: Well, when do we start? Let's get this thing started.

Hughes: Okay. We will be in the veneer plant for 15 to 20 minutes if you want to get in touch with us.

Robertson: All right now. How many of you guys want to go back to work in the morning. Some of the boys thought it would be better to wait till Monday. But first, how many of you guys want to go to work? The first thing we want to do is decide who ought to be in this bunch and who hadn't. Now you four boys (indicating 4 men), you four fellows I think just came down to, well, to start trouble.

Wright: Like hell. We're just looking out for our jobs same as you guys are. We want to go back to work as anybody. Only thing is we ain't had time to think this thing over like you guys have. You been thinkin' this over for 3 or 4 days—maybe longer; and we just heard about it a little while ago. When Johnson came down and asked us if we wanted to come out and hear what you had to say was the first time we'd heard about it. We was of the understanding that we could just listen to what

was said, and if we didn't want no part of it, we didn't have to take it. Ain't that right, Johnson?

Johnson: Yeah. I asked them to come down and that was my understanding.

Bloom: That's right. Tonight's the first we'd heard of it. We were of the understanding that if we didn't like it we didn't have to take it.

Robertson: If you guys don't like it, there's the door.

Wright: We want to hear what you've got to say. We're interested. Sure. But we just don't want to take any hasty action. You know yourself that never is right.

Robertson: Okay. All that wants to go to work raise their right hands.

Unidentified: Okay. Now we know we're gonna go to work. Now, when? Do we want to go to work in the morning or wait till Monday.

Unidentified: I think we'd better wait till Monday. Give the guys a chance to think it over.

Robertson: Well, you guys that ain't ready to go to work yet might as well leave then.

Wright: But us guys want to go to work just as bad as you guys do. We just ain't heard all about it yet.

Robertson: Okay. Everybody wants to go to work. Now let's have a show of hands. How many wants to go to work Monday? Okay, how many wants to go to work in the morning? Okay, so we go to work in the morning. Is that agreed?

Unidentified: I'll tell you, Robertson. Let's have

the men who want to go to work Monday to step over here.

Robertson: Okay. All the men who want to go to work in the morning step this way.

Unidentified: No, I said that wants to go to work Monday.

Robertson: All the men that want to go to work in the morning come over here. Okay, so we go to work in the morning. Now let's go see the bosses.

Thereafter Hughes and Nat and Ehrman Giustina were contacted in the veneer plant and requested to return to the shop which they did.

Robertson: Us boys have talked it over and most of us want to come back to work if the company will let us. Tomorrow morning.

Nat Giustina: Well, there's plenty of work, we'll see you in the morning when the whistle blows.

XIV.

The names of the persons set out in paragraph XIII above who are not otherwise identified are hereby identified as follows: Robertson, Louis Wright, Johnson, Zybach, Alldrit, Bloom, V. Bartunek and Marvin Bartunek were production or maintenance employees of Respondent. Howden is Business agent of the Union and Kraal is executive secretary of Council.

XV.

July 29 a sufficient number of strikers reported for work to enable Respondent to resume partial operations. On or about August 5, 1954, by a letter bearing that date, a copy of which is appended

hereto and marked "Appendix G," was sent by the Respondent by mail to all employees who had gone on strike and not returned. Thereafter, more employees who had been on strike returned to work and with new employees have continued Respondent's operations.

XVI.

On or about August 25 a petition for decertification was filed by an employee, Glenn L. Winey, employed in the unit as set forth above, which petition was docketed as Case No. 36-RD-75. The petition was dismissed by the Regional Director on December 6, 1954 by letter, a copy of which is appended hereto marked Appendix H, and made a part hereof. Thereafter petitioner appealed the action of the Regional Director to the Board. On March 8, 1955, the office of the Secretary of the Board, by letter, advised petitioner and others of the action of the Board, a copy of which letter is appended hereto marked Appendix I, and made a part hereof. In each of said letters the reference to "Glenn L. Winery" refers to one and the same as petitioner.

XVII.

On or about August 31, 1954 representatives of the Union presented to Respondent a proposal for strike settlement, a copy of which is appended hereto and marked Appendix J. At the time of presenting the proposal the following statements were made by individuals after whose names the comments appear:

Hughes: Is it your desire to negotiate on this (referring to paper which had been thrown on table by Howden).

Howden: Yes, we want to talk about the Governor's paper.

Hughes: This is the purpose of your asking to meet? (Referring to paper.) It isn't applicable in our case. In order to bring any of you fellows up to date, I would like to tell you that under date of August 26, 1954 this company received notification from the NLRB that a petition for decertification of Local 2611 as the collective bargaining agent for the employees in the plant had been filed. (Then read excerpts from letter of Mr. Robert Wiener of NLRB pertaining to petition.) I believe you (indicating Howden) have also received notification of this petition.

Howden: Yes, I have.

Hughes: Inasmuch as your position as bargaining agent has been questioned by the employees working in this plant and we have been officially notified of this by the NLRB, until that question is resolved we do not feel it is proper to negotiate with you.

Howden: Then you won't negotiate with us?

Hughes: Your status as bargaining agent has been questioned by the employees working in this plant, it is claimed that you no longer represent the majority of men working in this plant, and until that question is resolved we feel it is improper for us to negotiate with you.

Howden: If there wasn't a question about us being bargaining agent, would you negotiate with us?

Hughes: Of course.

XVIII.

On or about September 2, 1954 a letter, a copy of which is attached hereto and marked Appendix K was mailed from the Respondent to the Union.

XIX.

On or about January 19, 1955 the Union terminated its picketing and strike action against Respondent, and on said date delivered Respondent a letter, a copy of which is appended hereto and marked Appendix L. On January 21, 1955 about, and January 22, 1955, the Union delivered to Respondent further letters, a copy of each of which is appended hereto and marked Appendix M and N, respectively. On January 22, 1955 the Respondent replied by letter, a copy of which is appended hereto and marked Appendix O.

XX.

This stipulation may be received in evidence, to have the same force and effect as though the facts herein and the documents annexed hereto had been testified to or identified by competent witnesses, and the documents annexed hereto may be received in evidence without further identification. It is the further intention of the parties that this stipulation will not foreclose any party from calling witnesses to testify concerning any further facts material to the issue raised herein.

In Witness Whereof the parties hereto have caused this stipulation to be executed by their duly authorized counsel this 9th day of May, 1955.

GIUSTINA BROS. LUMBER CO.,

/s/ By RICHARD R. MORRIS,
Its Attorney.

LOCAL 2611, LUMBER AND
SAWMILL WORKERS, AFL.,

/s/ By DONALD S. RICHARDSON,
Its Attorney.

/s/ PATRICK H. WALKER,
Counsel for the General Counsel of the National
Labor Relations Board.

APPENDIX "A"

Agreement

This Agreement, made and entered into this 31st day of March, 1943, revised the 3rd day of November, 1949, and the 8th day of May, 1953, by and between Giustina Bros. Lumber Co., of Eugene, Oregon, hereinafter called the "Company" and Lumber and Sawmill Workers, Local Union No. 2611 of Eugene, Oregon, affiliated with the Willamette Valley District Council of Lumber and Sawmill Workers and chartered by the United Brotherhood of Carpenters and Joiners of America, an American Federation of Labor affiliate, hereinafter called the "Union," through their authorized agents, Witnesseth:

* * * * *

Article I.

The Company agrees to recognize the Lumber and Sawmill Workers Local Union No. 2611 as the sole bargaining agency in the sawmill and planing operations of Giustina Bros. Lumber Co. located in Eugene, Oregon, and the log dump and pond located in Springfield, Oregon, and that it will bargain collectively with those members who are employees of the Company as a whole.

* * * * *

Article VIII.

Wages

Wages shall continue subject to the right of either party to request a general wage change by giving the other party written notice of its desire for such general wage change. Negotiations shall commence within fifteen (15) days from the date the notice is received.

Article IX.

Strikes and Lockouts

The Company and the Union agree that the grievance procedures specified hereinabove in Article II are adequate to provide a fair and final determination of all grievances arising under the terms of this agreement.

Therefore, during the life of this agreement no strike shall be caused or sanctioned by the Union or any of its members and no lockouts shall be entered upon by the Company until every peaceable method of settlement of the difficulties involved, as provided hereinbefore in Article II, shall have been

tried and the parties hereto have been unable to resolve their differences.

If, after exhausting all steps in the grievance procedure, the Company and the Union are unable to reach a mutually satisfactory solution to the matter at issue and are deadlocked, ten days thereafter each party shall give to the other a written statement of its position on the matter in dispute; if, after having given and received these written statements, either party still desires to engage in a strike or lockout, it shall give five days' written notice of its desire to strike or lockout and a written statement specifying in detail its position on the matter in dispute. The party receiving such notice to strike or lockout and the accompanying specifications shall thereupon furnish to the other party a written statement of its position on the matter in controversy at the time notice to strike or lockout was received.

If this agreement is violated by the occurrence of a strike, work stoppage or interruption or impeding of work in the plant or any department, no

General Counsel's Exhibit No. 2—(Continued)
grievance shall be discussed or processed while such violation continues and the Union will endeavor to secure a return of the strikers to work in order that the dispute may then be settled peaceably in accordance with the procedures established in this agreement.

The company reserves the right to discipline employees taking part in any violation of this Article of this Agreement.

At no time shall Union employees be required to act as strikebreakers, but Union employees whose work is required for plant protection during any shutdown shall stay on the job and those who replace them shall not be considered strikebreakers.

* * * * *

Article XIII.

Termination

This agreement terminates on 1 April, 1954, but shall automatically extend from year to year unless either party hereto shall have given written notice to the other party at least seventy-five (75) days preceding April 1 of any year of its intention to modify, revise, adjust, or terminate this agreement, specifying in such notice the provisions that it desires to modify, revise, or adjust, or its desire for termination.

Upon the receipt of such notice the other party shall thereupon, and not less than sixty (60) days prior to April 1 of that year, offer any proposals it may have for modification, revision, adjustment, or termination of this agreement.

GIUSTINA BROS. LUMBER CO.

By N. B. GIUSTINA,

Its President

LOCAL UNION NO. 2611

Lumber and Sawmill Workers

By ILEY CASTEEL

CHIFFORD THIEL.

APPENDIX "B"

[Letterhead of Willamette Valley District Council
Lumber and Sawmill Workers.]

(Copy)

February 10, 1954

Giustina Bros. Lumber Company
2nd & Garfield
Eugene, Oregon.

Gentlemen:

Please be advised that the Willamette Valley District Council wishes to notify you that we wish to open negotiations for an increase of wages for all of your employees who are represented by our union.

We will appreciate the opportunity to discuss this matter with you or your representatives at an early date.

Awaiting your reply, we are

Very truly yours,

ELDON KRAAL,
Executive Secretary.

EK:vb

O.E.I.U. #11

A. F. of L.

APPENDIX "C"

Giustina Bros. Lumber Co., P. O. Box 989
Eugene, Oregon

February 20, 1954

(Copy)

Willamette Valley District Council, LSW-AFL
507 Willamette Street

Eugene, Oregon

Attention: Mr. Eldon Kraal, Executive Secretary

Gentlemen:

We have your letter of February 10, advising that your council wishes to open negotiations for an increase in wages for certain of our employees.

The Willamette Valley District Council is not the bargaining agent for our employees with authority to open negotiations on any subject.

Yours very truly,

GIUSTINA BROS. LUMBER CO.

Sam E. Hughes.

SEH/gg

cc: Local Union No. 2574

Local Union No. 2611

Willamette Valley Lumber Operators Assn.

APPENDIX "D"

480 Horn Lane
Eugene, Oregon
March 10, 1954

(Copy)

Giustina Bros. Lumber Co.
P. O. Box 989
Eugene, Oregon.

Gentlemen:

In reply to your letter of February 20, 1954, please be advised that the Willamette Valley District Council has been since February 5, 1948, and still is authorized by Local Union No. 2611 to open and negotiate wages in our behalf.

We wish to advise you further that the Willamette Valley District Council will hold that authority in the future unless we advise otherwise.

We hope that we have made this matter clear, and that in the near future you will enter into negotiations with the Willamette Valley District Council on the subject that is referred to in the letter dated February 10, 1954, addressed to you by the Willamette Valley District Council.

Very truly yours,

/s/ LELAND JAMES HOWDEN,

Leland James Howden, B.A.

Local Union No. 2611

[Local Union Seal]

P. S.: Former Local Union No. 2574 took the same action on February 19, 1948.

APPENDIX "E"

[Letterhead of Willamette Valley District Council
Lumber and Sawmill Workers.]

April 9, 1954

(Copy)

Giustina Bros. Lumber Company

Box 989

Eugene, Oregon.

Gentlemen:

Your attention is called to the our letter dated February 10, 1954 in which the Willamette Valley District Council requested a meeting with you or your representatives so that the matter of a wage increase for all of your employees who are represented by our Union could be discussed.

As of this date there has been no meeting with you on this matter. Furthermore, your attitude in this matter leads us to the conclusion that you are refusing to bargain in good faith with authorized agents of this Union.

Again we remind you that unless we are given the opportunity to meet and discuss this matter at an early date, we will have no alternative except to advise our membership to take such action as we deem necessary.

Please give this matter your serious attention.

May we expect an early reply?

Very truly yours,

ELDON KRAAL,

Executive Secretary.

cc: Local No. 2611

APPENDIX "F"

Giustina Bros. Lumber Co.
P. O. Box 989, Eugene, Oregon

April 13, 1954

Willamette Valley District Council
Lumber & Sawmill Workers, AFL
507 Willamette Street
Eugene, Oregon

Attention: Mr. Eldon Kraal, Executive Secretary

Gentlemen:

We have your letter of April 9, 1954.

We fail to find in your letter of February 10, 1954, a request, as alleged, for a meeting to discuss a wage increase for our employees.

You are hereby notified that we are authorizing a committee of Willamette Valley Lumber Operators Association to represent us, until further notice, in the discussions contemplated by your letter. You are further notified that the Association's committee is not authorized to reach any agreement binding upon us and that conclusions reached jointly by it and the authorized representatives of our local union are to be submitted to us for consideration.

Yours very truly,

GIUSTINA BROS. LUMBER CO.,
/s/ SAM E. HUGHES,
Sam E. Hughes.

SEH/gg

cc: Willamette Valley Lumber Operators Assn.

Local Union No. 2574

Local Union No. 2611

APPENDIX "H"

Registered No. 243,858.

Return Receipt Requested.

407 U. S. Courthouse
Seattle 4, Washington

December 6, 1954
(Copy)

Mr. Glenn L. Winery and Associates
115 Maxwell Road
Eugene, Oregon

Re: Giustina Bros. Lumber Co.—36-RD-75

Gentlemen:

The above-captioned case petitioning for an investigation and decertification of representatives under Section 9 of the National Labor Relations Act has been carefully investigated and considered.

It does not appear that further proceedings are warranted inasmuch as the collective bargaining agreement currently in effect between the company and Local 2611 of the Lumber and Sawmill Workers, AFL, constitutes a bar to investigation of representatives at this time. I am therefore dismissing the petition in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such a review with the National Labor Relations Board, Washington 25, D. C., and serving a copy upon the other parties, as well as with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The request should be filed within ten (10) days from the date of receipt of this letter, except that the Board may, upon good cause shown, grant special permission for a longer period within which to file.

Very truly yours,

THOMAS P. GRAHAM, JR.,
Regional Director.

- cc: 1. General Counsel; National Labor Relations Board; Washington 25, D. C.
2. Giustina Bros. Lumber Co.; (2nd & Garfield Sts.) P. O. Box 989; Eugene, Ore.
3. Lumber and Sawmill Workers Loc. 2611; 507 Willamette St.; Eugene, Ore.
4. Mr. R. R. Morris, Atty.; Failing Bldg.; Portland 4, Oregon.
5. Mr. Donald S. Richardson, Atty.; Green, Richardson, Green & Griswold; Corbett Bldg.; Portland 4, Oregon.
6. Willamette Valley District Council; Lumber & Sawmill Wkrs., AFL, 507 Willamette St.; Eugene, Oregon.

EXHIBIT I

March 8, 1955.

Lewis Hoffman, Esquire
877 Willamette Street
Eugene, Oregon

Re: Giustina Bros. Lumber Company
Case No. 36-RD-75

Dear Mr. Hoffman:

The Board has carefully considered your Request for Review of the Regional Director's dismissal of the petition in the above case and decided to sustain the dismissal on the ground that the Board, in conformity with its well-established practice, will not entertain a petition for representation while there is pending in Case No. 36-CA-663 a complaint alleging violations of Sections 8 (a) (1) and (5) of the Act.

Very truly yours,

GEORGE A. LEET,
Assistant Executive
Secretary.

cc: Thomas P. Graham, Dir., NLRB, Seattle,
Washington

Robert Wiener, Officer-in-Charge, NLRB,
Portland, Oregon

Mr. Glenn L. Winery and Associates, 115 Max-
well Road, Eugene, Ore.

Giustina Bros. Lumber Co., P. O. Box 989,
Eugene, Ore.

Lumber and Sawmill Workers Local 2611, 507
Willamette Street, Eugene, Ore.

Mr. R. R. Morris, Attorney, Failing Building,
Portland 4, Ore.

Mr. Donald S. Richardson, Attorney, Green,
Richardson, Green & Griswold, Corbett Bldg.,
Portland 4, Ore.

Willamette Valley District Council, Lumber &
Sawmill Workers, AFL, 207 Willamette St.,
Eugene, Oregon

APPENDIX "J"

Fact Finding Procedures:

In agreeing to fact finding procedures, all parties will, consistent with their authority in negotiations either themselves act, or recommend to their principals the actions of:

1. Returning all crews to work as soon as practical.
2. Refraining from discrimination against any employee, employer or Union member for conduct since the inception of the strike.
3. Withdrawing any pending legal actions arising solely out of the strike, or the negotiations that preceded the strike.

The Fact Finding Board or Panel

1. Shall not constitute a 'Board of Arbitration.'
2. Shall investigate the industry issues existing between labor and management in the present lumber strike and report its findings to both parties.
3. In making their investigation the panel shall take into account the standard of living and wages in other lumber producing areas, both domestic and foreign, as compared to wages and standard of living maintained in the Douglas Fir and Western Pine areas of the Pacific Northwest.
4. For the purposes of this study the industry shall be considered as the logging, lumber and plywood industry of the States of Oregon and Washington. The panel shall ignore market price distortions caused by unnatural shortages of materials.
5. Shall release to the public and the press and

radio a statement of the finding of the facts in the event that any of the parties fail to accept and act in accordance with any findings or recommendations of the board or panel.

6. The fact finding committee shall report within 90 days unless given further time by the union and the employers.

7. Should a wage increase result from these proceedings, such increase shall be paid retroactive to date employees return to work.

8. The panel shall consist of seven persons: one each from Oregon and Washington selected by the Union; one each from Oregon and Washington selected by the employers; two representing the public—selected by each of the Governors of Oregon and Washington—and a third to be appointed and designated jointly by the Governors of the States of Oregon and Washington as the chairman of the committee. The chairman shall have no vote in decisions except in case of a tie.

The Representatives of the Lumber Operators and the Lumber and Sawmill Workers, American Federation of Labor, recommend that the above stipulation be endorsed by the individual employer and the Union.

Signed—For the Employers:

/s/ MARTIN N. DEGGELLER,

For the Union:

/s/ KENNETH DAVIS,

Exec. Secretary, Northwestern
Council.

August 26, 1954.

APPENDIX "K"

(Copy)

Giustina Bros. Lumber Co.,
Eugene, Oregon

September 2, 1954

Local Union #2611, LSW-AFL
480 Horn Lane
Eugene, Oregon

Gentlemen:

You are notified that the Collective Bargaining Agreement between Local Union No. 2611, Lumber and Sawmill Workers and this company is terminated.

Very truly yours,

Giustina Bros. Lumber Co.

N. B. Giustina.

NBG/gg

APPENDIX "L"

1-19-55

Giustina Bros. Lumber Company,
P.O. Box 989,
Eugene, Oregon.

Gentlemen:

This is to notify you that Lumber and Sawmill Workers Local Union 2611 has taken action to terminate the strike of employees at your plant, and that the strike and picketing in connection therewith have been terminated.

The union hereby unconditionally requests the immediate reinstatement of the employees who have been on strike.

Very truly yours,

Lumber and Sawmill Workers Local
Union No. 2611,

/s/ By LELAND JAMES HOWDEN.

APPENDIX "O"

(Copy)

Giustina Bros. Lumber Co.

P. O. Box 989, Eugene, Oregon

January 22, 1955

Local #2611, LSW-AFL

480 Horn Lane

Eugene, Oregon

Attention: Mr. Leland James Howden

Gentlemen:

Receipt is acknowledged of your letter of January 19, 1955 asking reinstatement of men who went on strike.

You are advised that there are no vacancies in this plant.

Sincerely yours,

GIUSTINA BROS. LUMBER CO.

/s/ SAM E. HUGHES,

Sam E. Hughes.

SEH/gg

cc: Richard Morris

Attorney-at-Law

GENERAL COUNSEL'S EXHIBIT No. 3

United States of America
National Labor Relations Board

PETITION

Case No. 36-RD-7. Dated Filed: 8/25/54.

Compliance Status Checked by MD.

* * * * *

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition

* * * * *

C. RD—Decertification.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in section 9 (a) of the act.

* * * * *

2. Name of Employer: Giustina Bros. Lumber Co.

Employer Representative to Contact: Sam Hughes.

Phone No. 5-2301.

3. Address(es) of Establishment(s) Involved:
2nd & Garfield Streets, Eugene, Oregon.

4a. Type of Establishment: Factory.

4b. Identify Principal Product or Service: lumber manufacturing.

5. Description of Unit Involved:

6a. Number of Employees in Unit: 118.

6b. Is This Petition Supported by 30% or More of the Employees in the Unit? Yes.

Included all production and shipping employees of Giustina Bros. Lumber Co. sawmill operation at Eugene, Oregon.

Excluded guards, clerical and supervisory employees.

* * * * *

8. Recognized or Certified Bargaining Agent:

Local 2611, Lumber & Sawmill Workers.

Address: 5th & Willamette Streets, Eugene, Oregon.

Affiliation: A.F.L.

Date of Recognition or Certification: 1948—and ever since.

9. Date of Expiration of Current Contract, if any: April 1, 1955.

* * * * *

11. Parties or Organizations Other Than Petitioner Which Have Claimed Recognition as Representatives, and Other Unions Interested in the Employees Described in Item 5 Above:

Name: Local 2611 Lumber & Sawmill Workers.

Affiliation: A.F.L.

Address: 5th & Willamette Sts.

* * * * *

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Glenn L. Winey and Associates, employees of
Giustina Bros. Lumber Co.

/s/ By GLENN L. WINEY,

Lift Truck Operator.

Address 115 Maxwell Road, Eugene, Oregon.

Telephone number: 4-1245

GENERAL COUNSEL'S EXHIBIT No. 4

Lumber & Sawmill Workers Local Union No. 2611

480 Horn Lane

Eugene, Oregon

September 13, 1954

Giustina Brothers Lumber Company

Box 989

Eugene, Oregon.

Gentlemen:

With reference to your letter of September 2, 1954, we wish to call your attention to the fact that the collective bargaining agreement between your company and this Union can be terminated only in accordance with the provisions of Article XIII. The agreement, therefore, remains in effect.

Yours very truly,

Lumber and Sawmill Workers No.
2611

/s/ By LELAND JAMES HOWDEN,

Leland James Howden, Financial Secretary and
Business Agent, Local No. 2611.

GENERAL COUNSEL'S EXHIBIT No. 5

Lumber and Sawmill Workers Union

Local No. 2611

Eugene, Oregon

Archie Ashbridge

1030 Water St.

Springfield

C. E. Curts

Rec. Sec.

975 West 7th

February 5, 1948

Willamette Valley District Council

507 Willamette St.

Eugene, Oregon.

Dear Sirs and Brothers:

This is to notify you Local #2611 does hereby instruct the Council to continue negotiating for further increases in wages.

Fraternally yours,

/s/ CHAS. E. CURTS,

Rec. Sec.

(Local Union Seal)

RESPONDENT'S EXHIBIT No. 3

Transcript of Proceedings of Conference Between
Giustina Bros. Lumber Co. and A.F.L. Lumber
and Sawmill Workers Local Union No. 2611.

January 8, 1955

Appearances: Giustina Bros. Lumber Co. Sam
Hughes, Nat Giustina, Ehrman Giustina*.

*Mr. Ehrman Giustina was present at the conference but did not take part in the discussions. All references to "Mr. Giustina" in this transcript are to Mr. Nat Giustina.

Local Union No. 2611, A.F.L.—James Howden, Eldon Kraal.

Mr. Hughes: Before we get started here, in the past there have been alleged statements made by different persons representing the company and it is our feeling that there has been some inaccuracy as to those statements. So, we have asked to have a reporter present this morning to keep the record clear.

Now, I presume there is no objection on the part of the Union to that, Mr. Howden.

Mr. Howden: It is a little unusual. I have known it to be done, and usually, it played back to one or the other party's disadvantage. It is unusual, but I am not going to object.

Mr. Hughes: You have no objection then, on behalf of Local 2611?

Mr. Kraal: Before we get started here, I don't even know what we are going to talk about, and it might be that—ordinarily it would be, probably, in my opinion, it would be that, if people are ready to talk business, unless it is classified or secret or something, well, and if they aren't ashamed of what they have to say, then I don't think that—I know that I won't be ashamed of anything I have to say. But what are we here to talk about? From the letter that the local union had, it was impossible for me to know for sure. So, we are here this morning to see what the company has to talk about, what the company has in mind, what sort of business, what are we here for?

Mr. Hughes: Certainly, we intend to make that clear very shortly, Mr. Kraal. You, then have no objection, I presume?

Mr. Kraal: I have no objection.

Mr. Hughes: All right. This meeting is called, by the company. I presume that you are appearing in your capacity as Business Agent for Local 2611, is that correct?

Mr. Howden: Uh-huh.

Mr. Hughes: I presume that Mr. Kraal is in attendance on behalf of the Willamette Valley District Council. Is that correct?

Mr. Kraal: That is right.

Mr. Hughes: Fine. Now, this meeting, as I say, is at the request of the company. There have been developments that have taken place so far as the company is concerned, and we wish to direct your attention to those, and we wish to discuss with you the application of those developments, at least to some extent as they apply to this company.

These gentlemen over here are not invited, were not invited by the company. They have knowledge of this meeting as do many men in the plant. There has been a notice posted on the Board, and these men have appeared, I presume, as observers for the employees of Giustina Bros. Lumber Co. I assume there is no objection whatsoever, on your part, to that.

Mr. Howden: That is right.

Mr. Hughes: The meeting, as I say, is held at the request of the company. And we wish to make clear,

the holding of this meeting is not a waiver on the part of the company of any question of representation that has been raised by any employee in this company, or group of employees by means of a decertification petition, or any other matter brought before the NLRB. The company wishes you to be informed that the new developments we make reference to, are first of all the 7½ cent an hour pay increase which is being effectuated in a portion at least of the industry, and has been placed in effect in most other employer's operations that we have knowledge of. Secondly, as you may, or may not, know a recent decision of the National Labor Relations Board has reversed a prior holding and well-established rule of the Board to the effect that if there was a representation matter raised, a question raised concerning the status of an incumbent union, it was an unfair labor act for the company, the employer, to negotiate with the incumbent union. That is the other new development that I wish to make clear, and have the record show, and reference is made to that new development as the purpose of this meeting.

Mr. Kraal: I will interrupt you, if I may.

Mr. Hughes: Yes.

Mr. Kraal: You are speaking of something here, just at the last statement, that I am not aware of.

Mr. Hughes: It is an administrative decision of the National Labor Relations Board, General Council, and I am sure that Counsel for the Union is aware of the decision, and that they will advise you

on it. If you wish, I can give you the citation, Mr. Kraal.

Mr. Giustina: Is that in the advance sheets, Sam?

Mr. Hughes: Yes, it is a quite recent decision.

Mr. Kraal: Well, we are not prepared, at the moment, to have the advice of our Counsel.

Mr. Hughes: Well, I want to show that as far as the company is concerned, the purpose for calling this meeting, is the new developments which were noted in the letter to you, and you raised the issue earlier that you did not know, Mr. Kraal, the purpose of this meeting, and I wanted to lay that out, so you would be informed.

Mr. Kraal: There is no criticism on that, but I just wanted——

Mr. Hughes: Oh, surely, I appreciate that.

Mr. Kraal: I haven't been made aware of the fact, if it is a fact, that you just put out, laid out.

Mr. Hughes: If you would care to, I will give you the citation prior to your leaving the building and you can more readily refer to it, if you so desire.

This company is willing to place in effect as of January 1, 1955, a 7½ cent an hour wage increase to all employees in the plant, excepting Clerical Employees, guards, supervisors and others not under the—not in the bargaining unit under the act.

Is there any objection on the Union's part to the institution of such a wage increase? What is the feeling of Local 2611, Mr. Howden?

Mr. Howden: Since the 7½ cents has come up, we have not had a meeting and will not have one until Tuesday evening.

Mr. Giustina: Who had not had a meeting?

Mr. Howden: 2611. Local 2611 has not had a meeting. I think before it is put into effect it should be agreed upon and signed.

Mr. Hughes: It is the Union's desire than that the 7½ cents wage increase, effective January 1st, 1955, be committed to writing and signed prior to its effectuation in the plant. Is that correct?

Mr. Howden: Well, I would say, yes. The words there that I think is correct.

Mr. Hughes: Well, do you have any objection?—

Mr. Kraal: Well, as far as that is concerned, if I may interject myself into this, the question of wage under the negotiations and agreements that have been made in the past year, regarding the wages, have been authorized and are being—it has been directed by the local unions, that the District Council do the negotiating; and there is quite a bit of discussion, or several subjects as far as the Council—the District Council of this company is concerned that we would have to get out of the way before we could get down to talking about a wage contract and settlement.

This company is not a party to necessary agreements that should have been made and were made with other companies prior to the fact-finding panel of the Governors coming out with their present recommendation. Therefore, I think we are en-

tirely ahead of ourselves here, as far as the Union is concerned.

Mr. Hughes: Well, Mr. Kraal—

Mr. Kraal: There are several things that will have to be cleared up.

Mr. Hughes: As far as the Governor's fact-finding panel and your references to it, this company is not a party to that panel.

Mr. Kraal: That is what I am trying to say they haven't been made a party—

Mr. Hughes: I beg your pardon.

Mr. Kraal: Well, this the first time that I ever was informed that you ever had any intention to pay any attention whatever to any recommendation.

Mr. Hughes: We are prepared to place the 7½ cents an hour wage increase in effect because it appears to us that the industry pattern has been established, and in order to maintain our competitive position with other employers—and we are not unmindful that there are A.F.L. locals who have signed agreements effecting the 7½ cents an hour wage increase. There are a considerable—we are informed there are a considerable number of C.I.O. local unions and employers who have placed in effect the 7½ cents an hour wage increase. We are not placing it in effect because of being signatory to any agreement by a Governor's panel, or anything else. In that connection, it would be well to inform you possibly, Mr. Kraal, as well as Mr. Howden, that the affairs of this company are managed by a general manager appointed by a Board of

Directors. His primary responsibility is to the Board of Directors of this organization, and until such time as they see fit to elect an arbiter or a panel of so-called experts, then we feel that we will continue our present status as far as negotiating any wage increases are concerned. In short, we are not ready to turn over the management of this company to outsiders. We do not feel that the best interest of our employees, or this company, would be served by such a course of action. I state that to make clear our position on the Governor's so-called fact-finding panel.

Mr. Kraal: Well, I will make my position clear. I am not here to tell you you can, or you can't place it in effect. That is the company's business. You can do what you please about it, but it is neither here nor there with the District Council until certain other questions have been taken care of satisfactorily. We are not here to discuss 71½ cents wage increase or anything else until other things are cleared up. We are not here to tell you that you can't do it.

Mr. Hughes: Mr. Kraal, I——

Mr. Kraal: Evidently, so far, it is beginning to sound to me like, that so far as I am concerned, I don't have any business in here.

Mr. Hughes: Mr. Kraal, you were speaking as "we", and I know you represent the Willamette Valley District Council——

Mr. Kraal: When I say, "we", I mean the Willamette Valley District Council of Lumber and Sawmill Workers.

Mr. Hughes: We have no collective bargaining agreement with the Willamette Valley District Council, our collective bargaining agreement was with Local 2611. I have addressed my questions to the representative of 2611. You have the right to be called in here by 2611, if they so desire.

Mr. Kraal: That is right. But I have been called here by 2611, and I am speaking now in their behalf.

Mr. Hughes: I see. You are speaking now as a representative of 2611?

Mr. Kraal: Yes, sir.

Mr. Hughes: Then you have no objection to the institution of the 7½ cents an hour wage increase.

Mr. Kraal: I didn't say that.

Mr. Hughes: You think there are other matters that should be discussed first.

Mr. Kraal: I am not going to make any argument that will prevent you from doing whatever you see fit to do.

Mr. Hughes: You would not have any objection to it then, Mr. Kraal?

Mr. Kraal: That is not what I said.

Mr. Hughes: You do have an objection to it then, Mr. Kraal?

Mr. Kraal: I didn't say that either.

Mr. Hughes: What did you say then, Mr. Kraal?

Mr. Kraal: I said you just go ahead and run your own business as far as your wage structure is concerned here until you take care of such other matters between the union and the company, then

we will be prepared to talk, as to wages. At the present time, we are not prepared to talk.

Mr. Hughes: At the present time you are not prepared to talk anything with us until other issues which you refer to are taken care of, is that correct?

Mr. Kraal: That is right.

Mr. Hughes: Then your position is probably that we go along with this Governor's Fact-finding Panel?

Mr. Kraal: No, sir. I am not taking a position on anything regarding the Governor's Fact-finding Panel until other disputes are agreeably settled between the Union and this Company.

Mr. Hughes: I see.

Mr. Kraal: When we get that done, if ever. Then we will be ready to talk about the Governor's Fact-finding Panel and their recommendations for 7½ cents or any other amount that it is necessary to talk about. At the present time, we are not in a position to talk about them.

Mr. Hughes: At the present time——

Mr. Kraal: And in my opinion, neither are you.

Mr. Hughes: At the present time, Local 2611 is not in a position to discuss the 7½ cent an hour wage increase.

Mr. Kraal: That is correct.

Mr. Hughes: You don't desire to negotiate on the 7½ cent an hour wage increase?

Mr. Kraal: So long as the Company operates and performs as they are, and have been, that is

correct. We don't have any business talking to you about it.

Mr. Hughes: Are you referring to the pickets?

Mr. Kraal: That is right.

Mr. Hughes: Mr. Kraal, the strike was called by Local 2611. Not by this Company. The pickets have been placed and kept there apparently on behalf of Local 2611. So, I think that is a matter that is properly within the—within your sphere. In other words, we did not call the strike, Mr. Kraal. The strike was called by Local 2611, or the Willamette Valley District Council.

Mr. Kraal: Certainly it was. And it still is being operated under that local union.

Mr. Hughes: Well, that is what I say. As far as the company is concerned, we didn't call the strike. We haven't placed the pickets there.

Mr. Kraal: Nobody said you did.

Mr. Hughes: Then it is your desire——

Mr. Kraal: Some of the matters that caused the strike to be called, the Company did though.

Mr. Hughes: We refused to grant a wage increase as requested by the Willamette Valley District Council.

Mr. Krall: Right.

Mr. Hughes: That is probably correct.

Mr. Kraal: Refused to negotiate, and refused a lot of things. Committed unfair labor practice in our opinion. And those are unsettled questions.

Mr. Hughes: I am glad you stated that those were in your opinion, as there seems to be a diversion of opinion on that matter.

Mr. Kraal: It seems that probably some of the responsible people who have the decision to make, also, more or less agree with us. It seems up to the present time——

Mr. Hughes: I am glad to see that you said it seems, and more or less, because that leaves a very wide margin.

Mr. Kraal: It seems that they are more in favor of believing that the Union is correct, than they do that you are, the Company, so far.

Mr. Hughes: Well, the point that we wished to discuss with you as stated to you is the institution of the 7½ cent an hour wage increase. Now you have stated, Mr. Kraal, on behalf of Local 2611, that you are not opposing it, and you are not——

Mr. Kraal: I could state it but I haven't. So don't try to put words in my mouth.

Mr. Hughes: Well, may I ask you this question, Mr. Kraal? You are refusing to discuss the 7½ cent an hour wage increase?

Mr. Kraal: Right. That is right.

Mr. Hughes: You refused to discuss or negotiate on that subject?

Mr. Kraal: That is right, at the present time.

Mr. Hughes: At the present time. All right. The next thing, Mr. Kraal, if you refuse to discuss that. Is there any foreseeable time in the future when you feel that you will be in a position to discuss it?

Mr. Kraal: Whenever the way is cleared and other disputed matters are cleared up. I will be happy to discuss it.

Mr. Hughes: But as of this time you are not prepared to negotiate on the 7½ cent an hour wage increase?

Mr. Kraal: Correct.

Mr. Hughes: I will ask you again. Does the union object—does Local 2611 object Mr. Howden, to the institution of the 7½ cent an hour increase as of January 1st, 1955?

Mr. Howden: At the present time, until it is agreed to, and when it is agreed to, there will probably several other questions arise. And at that time, if all the questions concerning the 7½ cents are agreed upon, then the local will probably instruct the officers or the committee to sign such an agreement.

Mr. Hughes: You raised a number of interesting points there. Probably we should have discussed these earlier in our conversation. I note you have no committee in attendance at this meeting.

Mr. Howden: Uh-huh.

Mr. Hughes: Can you tell me why you don't Mr. Howden?

Mr. Howden: In their opinion there is more to be done to settle the dispute by a few men, than by a lot of men doing the talking.

Mr. Hughes: I see.

Mr. Kraal: The local committee doesn't have the authority to discuss 7½ cents, and just for the reason that we happened to suspect that perhaps that might be what the company wished to discuss, that is why the committee, the local committee, is not

here. When it comes down to the final decision, the local committee will have their right and the opportunity to help decide it.

Mr. Hughes: I see. In other words the——

Mr. Kraal: The District Council is—still has the authority on the wage question, and probably will have it for a long time.

Mr. Hughes: I see. That seems to be somewhat a contrary attitude that was expressed by a representative of the District Council at the time of the back to work, the Governor's——

Mr. Kraal: I don't agree with you.

Mr. Giustina: Weren't the agreements and the Governor's Fact-Finding Panel made between the locals and the companies.

Mr. Kraal: No, it was not. It was made between the Northwestern Council and——

Mr. Giustina: And the companies?

Mr. Kraal: And the local unions, and the various employers. And the final analysis signed their names to an agreement to abide by the decision of that Panel. But this company has not, to my knowledge, signed such a document.

Mr. Giustina: Well, I know, this company has no part of that.

Mr. Kraal: Well, o.k., then what are we—we are trying to be Amos and Andy around here, it looks to me like.

Mr. Giustina: Well, then the point boils down that the authority is still with the District Council.

Mr. Hughes: The agreement which was—the ten-

tative agreement which was presented to this company by Mr. Howden on the 28th of August has a space on it for the signature of the local union and the company. There was nothing for the Willamette Valley District Council to sign. Now, it is your position that the Willamette Valley District Council.—

Mr. Kraal: Well, the Willamette Valley District Council issued that paper, recommended it.

Mr. Hughes: Now, it is your position that no agreement could be reached between the local and the company, without the authority of the District Council, is that correct?

Mr. Kraal: Not under the laws and rules of the Union, no.

Mr. Hughes: I am not familiar with those laws and rules, Mr. Kraal. I am just asking you, is it impossible for the local union to reach an agreement with the company on the—

Mr. Kraal: It is not impossible for the local union to do that.

Mr. Hughes: If I understand you correctly—

Mr. Kraal: It is probably improbable, that they will do it.

Mr. Hughes: I see. Not impossible, but improbable.

Mr. Kraal: It is not impossible.

Mr. Hughes: I see. Thank you. Mr. Howden, to pursue this committee thing a little further, and I think that we have probably clarified a great deal of the questions surrounding that. The non-appear-

ance of the plant committee at this time could not be due to the fact that there are no persons eligible for membership on that committee?

Mr. Howden: There are members eligible for that committee.

Mr. Hughes: I thought possibly, your not having a committee here was an acknowledgment that there was no collective bargaining agreement in effect.

Mr. Kraal: Well, that sounds just like wishful thinking on your part, to me.

Mr. Hughes: We just wanted to have that point clarified, Mr. Kraal. There is a committee?

Mr. Kraal: There is a committee.

Mr. Hughes: I see. Then it is your position that the collective bargaining agreement is still in effect.

Mr. Kraal: It is still in effect.

Mr. Hughes: I see. And the non-appearance of that committee at this meeting has nothing to do with the non-existence of that collective bargaining agreement.

Mr. Kraal: I will answer that for you.

Mr. Hughes: I asked Mr. Howden the questions, Mr. Kraal.

Mr. Howden: Well, I will ask Mr. Kraal to answer it for you. Mr. Kraal is free to answer any questions.

Mr. Kraal: For your information there is a committee, an official committee of local 2611 at the present time, and they are available to discuss proper business. As soon as it is ascertained and

we are sure that it is proper business, they will be available for that. As long as it is improper, they probably will not.

Mr. Hughes: I want to be sure that we understand each other as far as the $7\frac{1}{2}$ cent an hour wage increase is concerned. The local union 2611 does not object to the institution of such a wage increase, and on the other hand they do not agree to it, is that correct, Mr. Howden?

Mr. Howden: There has been no meeting to vote on it to agree to it, on this operation, or on any other operation. They have not accepted the $7\frac{1}{2}$ cents. It has been recommended that they accept it.

Mr. Hughes: It has been recommended that they accept it?

Mr. Howden: Uh-huh. But there has been no vote taken on it.

Mr. Hughes: What has been your feeling as the Business Agent to the $7\frac{1}{2}$ cent an hour wage increase? What is your official position on it, as Business Agent, the agent for local 2611?

Mr. Howden: My official position on it will be—but you have got an awful lot tied in there in one question—that I will probably recommend acceptance of it, if certain other matters are understood.

Mr. Hughes: That is with this company?

Mr. Howden: With this company and all companies.

Mr. Hughes: Would you care to make reference to “certain other matters” at this time?

Mr. Howden: Probably I should let you talk, you have got more to say on that down through the line of your own point. Do you admit that the contracts are still in force?

Mr. Hughes: We make no such admission. In fact our position on the non-existence of the contract, is quite clear. It is our opinion that there is no collective bargaining agreement in effect. That has been terminated.

Mr. Howden: We disagree with you there. So, I state that if that agreement is not in force, which we—I claim it is, and the local still feels it is, that it would do you no good to try to make an agreement with the company on wages, as long as there is not a contract.

Mr. Hughes: You are still the collective bargaining agent, Mr. Howden, according to your admissions and statements.

Mr. Howden: But then—we are still the bargaining agent, and we still have a contract.

Mr. Hughes: You can be a collective bargaining agent, Mr. Howden, without a contract.

Mr. Howden: But we will state that the contract is still in force, and we will have to stand with that opinion, that it is still in force, before any wage settlement.

Mr. Hughes: Then, you do not care to—you will not agree with the company, that a 7½ cent an hour wage increase effective January the 1st, 1955, be placed in effect. Even though you claim there is a contract, you are not willing to agree to the placing in effect of that 7½ cent an hour increase.

Mr. Howden: Not at the present time, no.

Mr. Hughes: Not at the present time, I see. And as far as the future, you are not prepared at this time to make any statements concerning that until certain conditions have been met.

Mr. Howden: I wouldn't say that.

Mr. Hughes: Well, would you tell me what you would say?

Mr. Howden: Sometime in the future, I have not the authority to say, and I do not intend to say things that I do not have the authority to say.

Mr. Hughes: You are, you claim, the bargaining authority, and yet you refuse to negotiate the 7½ cent an hour wage increase. Now, isn't that somewhat inconsistent?

Mr. Howden: We will bargain on that along with all the rest of it.

Mr. Hughes: But you won't bargain on it by itself

Mr. Howden: We won't bargain on it by itself. We won't bargain on it, and on the contract.

Mr. Hughes: And on the contract.

Mr. Howden: Certainly.

Mr. Hughes: And is it your desire to bargain on a new contract at this time?

Mr. Howden: Definitely not.

Mr. Hughes: You don't desire to bargain on a new contract?

Mr. Howden: No.

Mr. Hughes: What is there to bargain on?

Mr. Howden: We state that the old contract is in force.

Mr. Hughes: And——

Mr. Howden: And that is would have to be lived up to. As I told you the last time, and the only time it was raised, sometime here in the latter part of June, or the first of July, I don't remember. I think it was about the 29th of June. And Nat asked me at that time if the contract was in force. And I said, "yes." And I will still stay by it.

Mr. Giustina: Well, Jim, you state that you have the bargaining authority. You state that the contract is still in force. And still you refuse to negotiate on $7\frac{1}{2}$ cents. What else is there to talk about.

Mr. Howden: Well, we will bargain on $7\frac{1}{2}$ cents, but then there is——

Mr. Giustina: Well what else have we got to talk about?

Mr. Howden: Well there is—now then, you go along, a——

Mr. Giustina: Are we violating the contract that you claim is in effect?

Mr. Howden: I won't say at this time, that you are.

Mr. Giustina: If, as is your contention, the contract is in effect, and you have our bargaining authority, and we are not violating the contract, and there is nothing to negotiate in the contract, why do you refuse to negotiate on the $7\frac{1}{2}$ cents?

Mr. Howden: Well, we haven't refused to negotiate on it?

Mr. Giustina: You have.

Mr. Hughes: Mr. Kraal stated that you refused to negotiate on it.

Mr. Kraal: Let me ask a question. I ought to ask a few questions, I think.

Mr. Hughes: Certainly.

Mr. Kraal: If you are so sure that the contract is not in effect, as you said numerous times, the company I mean, in writing and various communications, why don't you—why do you call the Union in here to find out whether you can place 71½ cents in effect, or not. Why don't you go ahead and act on your own good judgment and place it in effect and see what happens?

Mr. Hughes: May we answer that now?

Mr. Kraal: Why certainly. If you can answer it.

Mr. Hughes: I think it was answered very early and I think that we can restate it to you. The actions of the Board altering these conditions, as we stated. Your status as the collective bargaining agent has been challenged. There is a question of representation which has been raised by a considerable number of employees of Giustina Brothers Lumber Company——

Mr. Kraal: And by the company, itself, isn't that right?

Mr. Hughes: ——during the latter part of October or November, at least the latter part of 1954, the National Labor Relations Board has reversed its earlier policy of allowing a company, or employer to continue negotiating with an incumbent union. It is no longer an unfair labor act for an employer to negotiate with an incumbent union

when a question of representation has been raised, either by employees, or another union. Bearing those things in mind, we addressed a letter to you, because of the recent wage increases that have been effected in the industry, we addressed a letter to you and requested this meeting. I think, Mr. Kraal, that that answers your question, and will refresh your memory on those points.

Mr. Howden: Well, I think a transcript of that——

Mr. Kraal: Well, I don't think—maybe that is the best answer you can give me on it, but it still don't answer it.

Mr. Howden: Well, if I caught your wording there right, it does not stop you from negotiating with the incumbent union.

Mr. Hughes: So, we called you in—we requested this meeting. And it is our opinion that we would no longer be guilty of a possible unfair labor act by negotiating with you when your status has been challenged, as has been done in this case. That is why we desire to negotiate with you.

Mr. Howden: Now, say that that is—of course in your letter, you stated that it would not interfere with—which, we knew you would take the position, that it would not interfere with—in any way with the petition, the association petition.

Mr. Hughes: The exact wording of the letter is: “Neither this letter, nor any meeting, shall be construed to have any effect on the representation proceedings filed by Mr. Winey and associates.”

Mr. Howden: I didn't remember the exact word-

ing, but I knew what it meant. So, on—following that, and if the other things were put in, they would have no effect upon the Winey petition. If we made an agreement, or anything else upon the $7\frac{1}{2}$ cents, upon the contract was in force or was not in force.

Mr. Hughes: Well, I have already stated that if it is the local's desire to negotiate a new contract, why naturally, we are willing to negotiate. We want you to be sure that you understand our desire to negotiate a new contract, if it is your desire to do so. The point that we would like to discuss now, and what the main purpose of this meeting was, was the institution of the $7\frac{1}{2}$ cent an hour wage increase. I have already detected Mr. Kraal's objections to that. Whether he speaks for the membership or not, I have serious doubts, and whether the best purposes of the membership would be furthered by a steadfast adherence to that position, I also question. Mr. Kraal will have to answer to his membership for that. Possibly there are several questions in the minds of a considerable portion of the membership which Mr. Kraal represents, or claims to represent. I think I have seen certain signs of it in Eugene and Junction City, and towns down around Glide, Oregon, and so forth, Brownsville. Excuse me not Brownsville, Dawson. There seems to be a lot of people who——

Mr. Kraal: Well, there seems to be a lot of people that didn't follow the recommendations of the employer's union either, including this company. So, if we want to dig up a bunch of dirt here and sling it at each other, well we can just tie right

into that. I can put out a pretty good one there too.

Mr. Hughes: Mr. Kraal, just to make that point clear in your mind, as far as this organization is concerned, our negotiating, our primary responsibility is vested in a General Manager, as I have earlier pointed out to you, our Board of Directors isn't—

Mr. Kraal: Well, nobody is disputing, or even asking any questions about how this company operates, as far as their internal affairs of their company are concerned, and the Union is not interested. Therefore, as far as I am concerned you are just wasting your time to explain all of that, because it is not pertinent to this, and it is not the Union's business. We don't care. I don't personally care how—whether the company operates with a dictatorship, or a Board of Directors. That has nothing to do with the problem between the Union and the company.

Mr. Hughes: Well, since you have raised those points, Mr. Kraal, do you think there is any interest on the part of the persons in the collective bargaining unit here, whether the Union's affairs are governed by a Board of Directors or a dictator?

Mr. Kraal: Well, I don't even care to continue the argument with you on that point. I have tried to make that clear already.

Mr. Hughes: Well, your feeling on the 71½ cents an hour—can we get back on that, Mr. Kraal?

Mr. Kraal: You can get back on it, if you care to.

Mr. Hughes: What is your position on it? I am unable to discern it.

Mr. Kraal: I told you my position. I told you my position, and my official position, is at the present time, at the moment, that it is incorrect that we discuss it. Now, that doesn't mean that we are refusing to bargain on the 7½ cents or on any other wage matter that might be in front of us. But we have other matters that must be cleared satisfactorily to both parties to the dispute that we have been having and are still having. Until we come to that point of the disagreement, and at that time we will be prepared to discuss it.

Mr. Hughes: You are not prepared to negotiate on the 7½ cent an hour increase——

Mr. Kraal: Not until we take up some other unfair labor practices that are being conducted here and settle those satisfactorily.

Mr. Hughes: Well, is there anything else that you would care to discuss at this time.

Mr. Kraal: No. I had nothing on my mind to discuss at this time. I am here at your request.

Mr. Hughes: Yes.

Mr. Kraal: Not at mine. I would be happy to discuss anything that was between us, if it was possible to clear it up satisfactorily, so that it is fair to both parties, and a reasonable settlement could be reached. I am interested in that.

Mr. Hughes: You are interested in the 7½ cent an hour wage increase then.

Mr. Kraal: Pardon me. I am interested in all the matters that are in dispute between us.

Mr. Hughes: Well, on the 7½ cents an hour, Mr. Howden, I want to again say that the company is willing to place that in effect as of January the 1st, 1955. Apparently, the Union does not object, and they don't agree. They are off in this "Never never land" that we can't tell what they——

Mr. Giustina: Well, they are just refusing to negotiate on it.

Mr. Hughes: They have refused to negotiate on it.

Mr. Kraal: That is not true.

Mr. Hughes: At this time, if there is nothing else before the meeting——

Mr. Kraal: That is not true at all. I will dispute that. The union has not refused to negotiate.

Mr. Hughes: On the 7½ cent an hour wage increase——

Mr. Kraal: At the present moment, we have said that it is not the right time to negotiate on it, and other things must be cleared up first.

Mr. Hughes: Well, you are refusing to negotiate on the 7½ cents an hour, then.

Mr. Kraal: We are still sitting here, and we haven't refused.

Mr. Hughes: I am sorry, I thought I understood you——

Mr. Kraal: We just refused to take it up in the order that the company wishes it taken up in. We will take it up in a little different order.

Mr. Hughes: What order do you want to take it up in?

Mr. Kraal: And we will get the whole thing settled up.

Mr. Giustina: What order do you want to take it up in?

Mr. Kraal: The things that happened first, first. And we will get the stage set so that we can then discuss the 7½ cents.

Mr. Hughes: Well, we are prepared to listen to anything you have to say, Mr. Kraal and Mr. Howden, on behalf of Local 2611. Throw it out.

Mr. Howden: There are unfair labor practices, as you know, that are pending.

Mr. Hughes: May I correct that statement. Alleged unfair labor practices. We don't admit the existence of any unfair labor practices on the part of the company.

Mr. Howden: We alleged there were. Which has happened, certain things happened, and a complaint has been issued, and sometime probably before any decision is made one way or the other.

Mr. Hughes: And so, until such a decision is made, you are refusing to negotiate the 7½ cent wage increase.

Mr. Howden: I think there is some——

Mr. Kraal: He didn't say that, now. Far from it.

Mr. Hughes: Not very far from it.

Mr. Kraal: Pardon.

Mr. Hughes: Not very far from it.

Mr. Kraal: Well——

Mr. Giustina: Well, go ahead Jim——

Mr. Kraal: Quite a little ways from it.

Mr. Giustina: Go ahead Jim—we asked you what

we had to do to get to it. You are talking about the unfair—alleged unfair labor practices.

Mr. Howden: Well, there is a picket line here.

Mr. Giustina: We did not put the picket out there.

Mr. Howden: I know. Now you say—with that 7½ cents you would probably request the removal of that picket line.

Mr. Giustina: No.

Mr. Hughes: We never made such request.

Mr. Howden: Well, I don't think it is very pleasant for you to have it there. Maybe it is.

Mr. Giustina: It doesn't bother me a bit.

Mr. Howden: Then, there is men out there that are employees of this company.

Mr. Giustina: Where?

Mr. Hughes: You go ahead and finish your statement.

Mr. Howden: And they should be taken into consideration.

Mr. Giustina: You mean they are getting cold?

Mr. Howden: Oh, not very cold. They got gas lanterns there in most of those cars to keep warm by. And there is a question of the men there, employees of this company. That is one very important question.

Mr. Hughes: Are there some others?

Mr. Howden: There could be, but we might just as well start in on that one.

Mr. Hughes: Well, Jim, as far as the persons that are out there on the picket line, it is the company's position that they are not employees of this

company. They have been replaced. I think probably you would be doing your members out there a service if you advised them on that, if you have not already done so.

Mr. Howden: Why don't you advise them yourself, by a letter to that effect?

Mr. Hughes: Well, there doesn't seem to be any question in our mind as to the status, and we would make that clear to you. It is our position that they all have been replaced, that they are not employees of this company.

Mr. Kraal: Well, we take the position that they haven't been replaced.

Mr. Hughes: Well, we are operating at full capacity, Mr. Kraal. We have a sawyer and all positions in the plant are filled and have been since the early days in August. Now, not very many sawmills have a relief man for each job, in the plant. I wanted to get that one clear, Jim, so you can now——

Mr. Howden: Well, there is no use going any further if that is that way.

Mr. Giustina: In other words it all boils down to the unfair labor charge and until that is cleared you refuse to negotiate on the 7½ cents.

Mr. Kraal: Now, just a minute, Nat. If you mean by that statement that until such time as the Government, the National Labor Relations Board disposes of that charge that we feel that we just won't talk to you, then that is wrong. That isn't what we say.

Mr. Giustina: In other words, you will not talk

about the 71½ cents——

Mr. Kraal: As far as we are concerned, it is just as possible today, as it was on the 20th day of June, for the two of us, and our committees to sit down and run our own business. You know, it is still possible to do that today, provided that the company is willing to do it. We are willing to try to do it. We are not saying that we are just going to sit here and keep the pickets on this mill until such time as the National Labor Relations Board decides the dispute which we have put in their hands. That isn't what we are saying.

Mr. Giustina: What are you saying?

Mr. Kraal: We are trying to say that if we can mutually agree, on the various points of the dispute between the Union and the Company, which includes the 71½ cents, or some amount of increase.

Mr. Hughes: There is no dispute on our part as to the 71½ cents.

Mr. Kraal: You stated 71½ so I mention it. We can come around to the point in negotiations, in our opinion, that we are willing to try to do that, to clear up all the matter that is before the Board in the litigations, and so forth.

We haven't offered to do that up until now, but we assumed that you realized that that would be possible, and we have realized it all the time, and we still do.

Mr. Hughes: Well, all the differences you are referring to, Mr. Kraal, are differences that are now pending before the Board, correct?

Mr. Kraal: Well, I don't know of any others.

any other disagreements between us, other than what is covered by those cases before the Board. Of course, the cases before the Board doesn't cover any increase in wages. That is a matter that is covered by other — by the Governor's panel, and the mechanics that have been gone through on that score.

Mr. Hughes: Well, we are not a party to that.

Mr. Kraal: To some extent it is covered, I don't mean that this company is bound by it, or that the Union is bound by it, if they don't care to be. The Union, as a whole, which has been made public in the paper, the A. F. of L. Lumber and Sawmill Workers have agreed, and it has been publicized in the paper, that we are recommending as a settlement to the wage dispute, but it just so happens that we have some other disputes between us here besides wages, and that is what I have been trying to say, about four or five times, that we have got a little bigger job to do here than just to settle the wages now. And if we go at in the way that I think we should, we will settle it in its order. We will settle those things that must be settled first and then we come up to the wages, and when that is settled, as far as I know, that is all the dispute that there is between us and the company.

Mr. Hughes: Mr. Kraal, as far as the 7½ cents an hour increase is concerned, we do not regard our offer to grant that increase as prejudicing any right or remedy, or anything the Union desires to do whatsoever. We do not consider that as a waiver on your part of the unfair labor practice charges

which you have seen fit to bring against the company.

Mr. Kraal: Well, you might not consider it that way, but I would. I would certainly consider it quite a waiver of several other questions, if we sit down here with you this morning and tell you, you go ahead and pay your scabs 7½ cents. We are just not negotiating for that kind of people you see.

Mr. Hughes: Oh, I see.

Mr. Kraal: Ordinarily.

Mr. Hughes: Oh, I see. Then, it is because you don't really like the attitude or the actions of the employees of this company that you are refusing to agree——

Mr. Kraal: I am not saying the employees of the company, I am saying the company itself.

Mr. Hughes: Well, you refer to them as "scabs".

Mr. Kraal: I just don't like the attitude of the company. Neither does the Union like it. It isn't just me personally.

Mr. Hughes: Well, Mr. Kraal, if you don't like the attitude of the company, and it is — and your dislikes of the company are the only things that are keeping you from agreeing to this wage increase, don't you think that you are hurting the employees in the collective bargaining——

Mr. Kraal: I just don't care to tell you how I feel. If you don't understand what I think about it now, you never would, and I am not going to answer you any more on that. I will keep quiet.

Mr. Hughes: You don't desire to talk about that.

Mr. Kraal: Not the 7½ cents, I don't.

Mr. Hughes: You raised the point, Mr. Kraal, in your discussion of scabs, and the attitude of the company. I just wanted to be sure that I understood——

Mr. Kraal: Well, I might have raised the point right here, but the fact—I didn't raise the fact, you did. You made it a fact; I didn't.

Mr. Hughes: Yes. I called attention to your statement, Mr. Kraal. Well, it seems abundantly clear——

Mr. Kraal: I didn't operate the mill, so—so, you did.

Mr. Hughes: That is correct, and we are still operating it.

Mr. Kraal: O.K. Well, they couldn't have been here without your sanction.

Mr. Hughes: But, Mr. Kraal,——

Mr. Kraal: It couldn't have been operated in the manner that it has been without the sanction of the company.

Mr. Hughes: Certainly, Mr. Kraal, but——

Mr. Kraal: And therefore, I am not taking the responsibility for it. I am not about to.

Mr. Hughes: Mr. Kraal, we are not aware of any law or regulation, or rule, or anything else that requires an employer to cease doing business because of the wishes of the District Council, or anyone else.

Mr. Kraal: Well, there is probably a lot of things that you don't seem to be aware of.

Mr. Hughes: Quite possibly that is correct, Mr. Kraal.

Mr. Howden: Coming back to another point. The men out on that picket line are no longer employees of this company. That is your position.

Mr. Hughes: That is right. They have been replaced.

Mr. Howden: They have been replaced, and have no job now, or in the future with this plant.

Mr. Hughes: Well, now,——

Mr. Howden: Well, not now or in the future, but now, or if—not in the future, because I don't think that even you would take that position, because there are one or two of them you might want back. But they are not employees now, and if we were just to remove the picket line, you would not put them back on in force, and as an employee of the company.

Mr. Hughes: If you mean, Mr. Howden, if Local 2611 would remove the picket line, and the men who were on picket duty would be brought back to the company and replace those men who are now working here, we are not willing to do any such thing at all.

Mr. Kraal: Well, do you have——

Mr. Hughes: In other words—may I finish up this statement? In other words, Mr. Howden, this company is not willing to discharge those replacements who are actively employed here at this time, in order that those persons who are on strike may return and once again become employees of this company.

As far as future employment is concerned, obviously, at any time that a man desires to apply for

work at this plant, he has a right to do so. If there is a job open at that time, we would certainly give anyone full consideration for that job. Does that answer your question?

Mr. Howden: That answers my question.

Mr. Hughes: Now, Mr. Kraal, you had one.

Mr. Kraal: Yes, I wanted to ask you this question. Do you have a proposition that you wish the Union to consider that you could put into writing so that it could be considered?

Mr. Hughes: We are agreeable to reducing to writing a statement to this effect. The Company offers and the Union accepts a 7½ cent an hour wage increase effective January 1, 1955, to all employees, on the payroll, excepting guards, clerical employees, supervisors, and others who aren't under the Union.

Mr. Kraal: The way you worded that——

Mr. Hughes: I beg your pardon.

Mr. Kraal: The way you worded that, if I didn't misunderstand you in your statement. The way you stated that, that if Howden and I would say, o.k. we agree to it, you can do it. Then you would put it in writing so that the union could see it. Or would you put it in writing that you are willing to do that if the union will accept it.

Mr. Hughes: Any agreement that is reached between the Union and ourselves, we are willing to reduce to writing and sign.

Mr. Kraal: Well, are you willing to submit your proposition to the Union in writing, without any

agreement on it, so that the Union could consider it, and see whether they will accept it.

Mr. Hughes: Do you think that if the Company made such a proposition as this, that they would back out on it?

Mr. Kraal: I think that it is customary for any party that is willing to make an agreement, to submit it in writing for consideration by the other party. And that is what I am asking you. Are you willing to do that today?

Mr. Hughes: If requested——

Mr. Kraal: Do you have any proposition that you are willing to submit in writing so that it can be studied and decided whether it will be acceptable or not?

Mr. Hughes: If requested by the Union, we are willing to reduce to writing an agreement to the effect that we will institute a 7½ cent an hour wage increase effective January the 1st, 1955.

Mr. Kraal: You are not willing to submit a proposal for that agreement?

Mr. Hughes: Oh, I wouldn't deny——

Mr. Kraal: Or an agreement of any kind.

Mr. Hughes: Oh, I wouldn't deny that we would be agreeable. We would certainly consider the submission of it. Would you like to submit something for our consideration?

Mr. Kraal: Well, I would suggest that if you have something in mind that you would like to have acceptable by the Union, why don't you do that?

Mr. Hughes: Well, from your statement earlier in the day, I was under the impression that you

were unwilling for us—that you did not agree to the institution of the 7½ cent an hour wage increase.

Mr. Kraal: Well, you misunderstood me entirely.

Mr. Hughes: I am sorry.

Mr. Kraal: I am unwilling to agree with anything.

Mr. Hughes: You what?

Mr. Kraal: I will not make an agreement with you on any 7½ cent or any other amount of increase in wages at the present moment, but I certainly wouldn't try to tell you that you have no right to submit a proposal.

Mr. Hughes: You have changed——

Mr. Kraal: For whatever you might have in mind.

Mr. Hughes: You changed your position didn't you, Mr. Kraal. You are changing your position?

Mr. Kraal: No, I am not changing it either.

Mr. Hughes: It seems to me you are.

Mr. Kraal: It is hard for me to understand you. It always has been.

Mr. Hughes: Apparently. I think I can understand you, though, some of the time.

Mr. Kraal: If you have a proposition that you would like the Union to consider, and furthermore, that you would like the Union to agree with you on, why don't you submit it to us at this time? It will be considered.

Mr. Hughes: Are the representatives of Local 2611, that are here at this meeting agreeable to the

consideration of a wage increase of 7½ cents an hour, effective as of January the 1st——

Mr. Kraal: Well, how would I know.

Mr. Hughes: Well, you are one of the representatives.

Mr. Kraal: How would I know whether they are or not?

Mr. Hughes: You are one of the representatives. Don't you understand what I say, Mr. Kraal?

Mr. Kraal: I am not a crystal-ball gazer, though.

Mr. Hughes: Oh, I see.

Mr. Giustina: All he asked was consideration.

Mr. Kraal: I am telling you that if you have a proposition to make the Union, submit it in writing, and it will be considered, and you will have your answer before very long.

Mr. Hughes: Did you have something to say, Mr. Howden: Did you want to reiterate what he was saying?

Mr. Howden: I wanted to bring it down in a few shorter words.

Mr. Hughes: Well, go ahead and do so, if you would like to.

Mr. Howden: Well, it has been said.

Mr. Hughes: Is there anything else you care to discuss at this time, Mr. Howden?

Mr. Howden: Not that I know of. I note that this is being played on a machine. Could there be a transcript made of that and sent to me?

Mr. Hughes: If you are willing to pay your share of the cost, certainly.

Mr. Howden: If there is one going to be made, yes.

Mr. Hughes: If you would like a copy, Mr. Howden, we would be very glad to furnish one to you. Of course, we understand that you will take care of your pro rata share of it. It won't be a great sum.

Mr. Howden: Well, that is what I realize. And I will state here so you can get it on that, that I will pay for it. And this is not the Union will pay for it, I will pay for it.

Mr. Hughes: I was going to comment that probably you were obligating the Union or yourself for something here without the approval of the Local.

Mr. Howden: I realize that.

Mr. Hughes: That would be inconsistent with Mr. Kraal's position that he can't do such.

Mr. Howden: I couldn't do such.

Mr. Hughes: Well, is there anything further then than that, that you have to discuss at this time.

Mr. Howden: No.

Mr. Hughes: Do you have anything further, Mr. Kraal?

Mr. Kraal: No.

Mr. Hughes: I think you have made your position quite clear.

Mr. Kraal: It is your move, in my opinion.

Mr. Hughes: What was that?

Mr. Kraal: It is your move. Whatever you have that you want considered, give it to us so that we

can not be mistaken about what you mean, and we will consider it.

Mr. Hughes: I suggest we recess this meeting pending any new propositions or proposals the company has, or the Union has, or any consideration either party cares to give to the proposals made by the other party. Is that agreeable to you, gentlemen?

Mr. Kraal: We recess it how long? Until either party has some other idea?

Mr. Hughes: Which would have to be at a reasonable time.

Mr. Kraal: Well, I think that is a good idea.

Mr. Hughes: You don't have any objection to that, do you?

Mr. Kraal: No. No. I don't. There is no use sitting here, if we aren't getting anywhere.

(Whereupon, the meeting was recessed.)

RESPONDENT'S EXHIBIT No. 4

Request for Special Meeting

Albert R. Gregg

President, Local Union No. 2611

Lumber and Sawmill Workers, AFL

1251 "M" St., Springfield, Oregon

Brother President:

We, the undersigned members in good standing of Local No. 2611, Lumber and Sawmill Workers, AFL, request that a special meeting of the membership of Local No. 2611 be called on Saturday, July 24, 1954 at 7:30 P. M. for the purpose of withdraw-

ing from the Willamette Valley District Council its authority to represent Local No. 2611 in the current wage negotiations and take such other action as is consistent and necessary under the existing situation.

/s/ Louis A. Nielsen
/s/ Earl M. Vaughan
/s/ George Rohrbacker
/s/ W. J. Priest
/s/ John E. Costello
/s/ Joe Evoniuk
/s/ Glenn L. Winey
/s/ Oliver L. Dorsey
/s/ Levi B. Churchill
/s/ Edwin H. Peterson
/s/ Alva L. Robertson

(Copy) : Leland J. Howden, Business Agent

RESPONDENT'S EXHIBIT No. 5

Memorandum of Understanding Between Local
#2611 and Giustina Bros. Lumber Co.

Second Shift

As the second shift is to be on a temporary basis, men moving from the first shift to the second shift, and men moving on the first shift, shall at the termination of the second shift return to their former positions, and advancements of permanency shall come at that time.

After the termination of the second shift, men shall be called back in the order of their original

hire, taking into consideration their ability to do the job required.

Men called back within one month of termination shall be entitled to continuous employment.

Night shift is to be terminated on a week-end.
To be posted

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Mr. Patrick H. Walker, for the General Counsel.
Mr. Richard R. Morris, of Portland, Oreg., for the Respondent. Mr. Donald S. Richardson, of Green, Richardson, Green and Griswold, Portland, Oreg., for the Union.

Before: Maurice M. Miller, Trial Examiner.

Statement of the Case

Upon an original charge and amended charge, each duly filed and served, the General Counsel of the National Labor Relations Board, in the name of the Board, caused the Regional Director of its Nineteenth Region, at Seattle, Washington, to issue a Complaint and Notice of Hearing on December 20, 1954, against Giustina Bros. Lumber Co., designated as the Respondent in this report, under Section 10 (b) of the National Labor Relations Act, as amended, 61 Stat. 136. The respondent was charged, therein, with the commission of unfair labor practices under Section 8 (a) (1) and (5) of the statute. Copies of the aforesaid Complaint, the

Notice of Hearing, and the applicable charges were duly served upon the firm involved. Thereafter, however — upon a second amended charge duly served under the statute — the General Counsel caused the issuance of an Amended Complaint by the Regional Director on April 19, 1955; copies of the Amended Complaint and the second amended charge were, again, duly served upon the respondent employer.

The Complaint, as amended, alleged in substance: (1) that Local 2611 of the Lumber and Sawmill Workers, AFL, a labor organization—to be designated as the Union in this report—was entitled, at all material times, to act as the exclusive bargaining representative of the Respondent's employees within a unit appropriate for the purposes of a collective bargain, and that it is still so entitled; (2) that strike action was instituted against the Respondent by the Union, on or about June 21, 1954, for economic objectives; (3) that the Respondent, between July 28, 1954, and September 2, 1954, undertook certain action which interfered with, restrained, and coerced its employees in the exercise of rights statutorily guaranteed; (4) that certain aspects of the Respondent's conduct, as set forth, reveal its failure and refusal to bargain in good faith with the Union as the exclusive representative of its employees in a unit appropriate for the purposes of a collective bargain; (5) that the Respondent's course of conduct converted the Union's strike action into an unfair labor practice strike, and prolonged it; and (6) that the Union, on January 19,

1955, unconditionally requested the Respondent to reinstate certain named strikers immediately, and that the Respondent refused, and has continued to refuse, to reinstate these employees to their former, or substantially equivalent, employment. This course of conduct, it is alleged, involved a refusal on the part of the Respondent to bargain in good faith, discrimination in regard to the hire and employment tenure of its striking employees to discourage union membership, and interference, restraint, and coercion directed to the aforesaid employees.

The Respondent's Answer—as filed at the outset of the hearing, without objection, and subsequently amended—admitted the jurisdictional allegations of the Complaint and the General Counsel's description of the unit alleged to be appropriate for the purposes of a collective bargain. The status of the Union as a “collective bargaining representative” of the Respondent's employees within an appropriate unit, prior to June 21, 1954, was conceded; the Answer, however, placed in issue the alleged status of the Union as the exclusive bargaining representative of the employees in a unit appropriate for the purposes of a collective bargain on or after June 21, 1954, when the Union economic strike began. The allegations of the Amended Complaint with respect to the Union's institution of strike action were admitted. The Respondent, however, denied the commission of any unfair labor practices, as charged by the General Counsel, and specifically denied that the course of conduct attrib-

uted to it in the Amended Complaint had converted the Union's strike for economic objectives into an unfair labor practice strike, which was thereafter extended and prolonged until its termination on January 19, 1955, by the labor organization. The Respondent admitted a refusal to reinstate certain persons to their former employment, on or after the indicated date, but denied every other aspect of the General Counsel's allegation in this connection.

(As issued and served, the Amended Complaint had listed 133 employees allegedly denied reinstatement by the Respondent, after the Union's unconditional request on January 19, 1955, for the restoration of their employment status. At the hearing, three names were stricken from the list, upon the General Counsel's motion, and two names were added. The Respondent made no objection; its Answer may be taken as a denial of liability with respect to the individuals named in the last amendment.)

By way of affirmative defense, the Respondent alleged, upon various grounds, that a question existed, after July 15, 1954, as to whether the Union still represented a majority of the Respondent's employees within the unit conceded to be appropriate for the purposes of a collective bargain. In addition, the Respondent alleged that the strike action sponsored by the Union had involved a breach of the labor agreement then in effect between the firm and the labor organization, that the Respondent had then taken steps to terminate the agreement, and

that the Union's action constituted an unfair labor practice within the meaning of the Act, as amended.

Pursuant to notice, a hearing was held before me, as the duly designated Trial Examiner, at Eugene, Oregon, on May 9 - 11, 1955. Each of the parties was represented by counsel. Each was afforded a full opportunity to be heard, to examine and cross examine witnesses, and to introduce evidence pertinent to the issues. At the outset of the case the General Counsel moved to strike certain allegations embodied in the Respondent's affirmative defense, and further moved that it be required to make certain portions of the affirmative answer filed more definite and certain. The motion to strike was denied. A decision with respect to the motion that the Respondent's affirmative answer be made more definite and certain was deferred, in anticipation of an Amended Answer to be filed; upon its receipt, however, the motion was not pressed, and the record fails to reveal its disposition.

(For the record, an in order to assure its completeness in this connection, the motion is now denied.)

At the conclusion of the testimony, the parties were advised of their right to argue orally upon the record, and to file briefs or proposed findings and conclusions; oral arguments were waived, however, and the parties indicated their intention to file briefs. The briefs have been received and considered.

Upon the entire record in the case, and my observation of the witnesses, I make the following findings of fact:

Findings of Fact

I. The Business of the Respondent

The Respondent, Giustina Bros. Lumber Co., is an Oregon corporation engaged in the processing of lumber and lumber products, with its principal offices and place of business in Eugene, Oregon. In the course of its business, the Respondent produces and ships in commerce products valued in excess of \$100,000 annually, among the several states of the United States other than the State of Oregon.

The Respondent has conceded, and I find, that it is engaged in commerce within the meaning of the Act, as amended. In the light of the available evidence, and in accordance with the Board's newly established policy — see *Jonesboro Grain Drying Cooperative*, 110 NLRB No. 67, 35 LRRM 1038— I find that the assertion of the Board's jurisdiction in this case would be warranted to effectuate the objectives of the statute.

II. The Labor Organization Involved

Local 2611 of the Lumber and Sawmill Workers, AFL, to be designated as the Union in this report, is a labor organization within the meaning of Section 2 (5) of the Act, as amended, which admits employees of the Respondent to membership.

III. The Unfair Labor Practices

A. Background

There is a suggestion, in the record, that the Union, or a sister organization, may have represented the Respondent's mill and pond employees

since 1938, and that it may have been recognized as their representative, by the Respondent, since that date. Whatever the situation may have been from 1938 to 1943, however, the record with respect to more recent years is clear. Between March 31, 1943, and June 21, 1954, I find, the Respondent recognized and dealt with the Union, under successive trade agreements, as the "sole" and exclusive representative of its employees in a bargaining unit defined by stipulation as follows:

All employees at the Respondent's sawmill and planing operations in Eugene, Oregon, and the log dump and pond located at Springfield, Oregon, excluding office and professional employees, guards, and supervisors as defined in the Act.

As of June 20, 1954, these employees were 220 in number. The most recent revisions of the trade agreement executed for the benefit of the employees became effective on May 8, 1953: the agreement remained in force until April 1, 1954, and was automatically extended to April 1, 1955, by virtue of the failure of either party, apparently, to give written notice to the other, at least seventy-five days prior to its indicated terminal date, of any intention with respect to its modification, revision, adjustment, or termination.

B. The Contract

Under Article II of the agreement, the Union undertook to elect and maintain a Plant Committee to represent the employees, and the Company un-

dertook, reciprocally, to appoint and maintain a committee as its representative. The parties agreed that these committees would meet "to analyze and adjust all complaints arising out of the collective bargaining relationship" between them. In the event of any inability on the part of the Plant Committee to adjust a "grievance" under the contract, it was accorded the right to call upon representatives of the Union and/or representatives of its hierarchical superiors, the Willamette Valley District Council, the Northwest Council of Lumber and Sawmill Workers and the United Brotherhood of Carpenters and Joiners of America, for assistance. The agreement went on to provide that if any grievance could not be adjusted through these representatives, a "joint board" should be created, ad hoc, with three members to be named by each contracting party; the joint board, under the contract, would be required to submit a "proposal" for the settlement of the dispute which had led to its creation.

Additionally, under Article II of their agreement, the parties specifically established the procedure to be utilized for the adjustment of "employee grievances" as contractually defined. The contract provided, inter alia, for the submission of such grievances, in written form, to the Respondent—within certain specified time limits—and for the submission of a copy to the Plant Committee previously designated. Although the procedure to be followed with respect to "employee grievances" after their submission was not contractually detailed, the agreement revealed an obvious intent that the Plant

Committee and the company committee should meet to discuss the grievance; it provided, for example, that any employees involved in a grievance "will" attend such meetings.

Article IX of the agreement dealt with strikes and lockouts. Its provisions in this connection read as follows:

The Company and the Union agree that the grievance procedures specified hereinabove in Article II are adequate to provide a fair and final determination of all grievances arising under the terms of this agreement. Therefore, during the life of this agreement no strike shall be caused or sanctioned by the Union or any of its members and no lockouts shall be entered upon by the Company until every peaceable method of settlement of the difficulties involved, as provided hereinbefore in Article II, shall have been tried and the parties hereto have been unable to resolve their differences.

Under the agreement, if unable to reach a mutually satisfactory solution of any issue after the exhaustion of the contractually established grievance procedure, each party was required to provide the other, within specified time limits, with a written statement of its position in the dispute; upon the exchange of these statements, the party desirous of engaging in a strike or lockout was required to give five days' written notice of its desires in that regard, and a written statement specifying in detail

its current position on the issues in controversy. The party receiving such a notice and specification was required to furnish, anew, a written statement of its position on the matter in dispute, at the time of its receipt of the notice. In the event of any violation of these contractual provisions, by a "strike, work stoppage or interruption or impeding of work" in the Respondent's plant, the agreement provided that no grievance should be discussed or processed for the duration of the violation. The Union, under the agreement, was contractually obligated to endeavor to secure a return of any strikers to work, in order to facilitate a peaceful settlement of the dispute in accordance with contractually established procedures, and the Respondent's reserved right to discipline the employees involved in any violation of the agreement in this respect was recognized. Article IX concludes with a commitment, however, that Union employees shall, at no time, be required to act as strike breakers.

With respect to its termination, as previously noted, Article XIII of the agreement provided for lapses on the first of April in 1954 and subsequent years, subject to its automatic renewal from year to year, however, in the absence of written notice, within a given time limit, with respect to the desire of either party to modify, revise, adjust, or terminate their contractual relationship.

Within the limits thus established, with respect to termination, Article VIII of the agreement also contained a specific provision with respect to the

renegotiation of wage rates. In this connection, the agreement provided that:

Wages shall continue subject to the right of either party to request a general wage change by giving the other party written notice of its desire for such general wage change. Negotiations shall commence within fifteen (15) days from the date the notice is received.

There was no provision in the agreement, as revealed by the present record, calculated to define, specifically, the relationship between such wage negotiations and the procedure established for the analysis and adjustment of "complaints" arising out of the collective bargaining relationship, or the settlement of grievances. Nor does analysis reveal any definite connection between a possible impasse or "deadlock" on wage issues and the contractually established procedure, previously noted, with respect to the agreement's modification, revision, adjustment, or termination.

C. The Collective Bargaining Relationship

At all times material, the Respondent was a member of the Willamette Valley Lumber Operators Association, to be designated as the Association in this report. Insofar as the record shows, it still holds Association membership. This organization, as the evidence shows, functions under Oregon law as a non-profit corporation. Its membership is limited to individuals or business enterprises engaged in a forests products industry. On the basis of a stipulation by the parties, it is possible to infer, and I

do infer, that the Association exists, at least in part, to serve the interests of its membership in labor relations matters. From time to time, as the stipulation shows, members of the Association may delegate limited authority to a committee, drawn from their number, to negotiate with the bargaining agents of their respective employees.

(According to the labor relations director of the Respondent, whom I credit in this connection, the firm has, in the past, conferred such limited authority upon the Association or an Association committee; these grants of authority have not encompassed any power to bind the firm. Nor have they been continuing grants; on each occasion, as required, the Association has been separately authorized to act for the respondent employer.)

The Union, at all material times, was affiliated with the Willamette Valley District Council of Lumber and Sawmill Workers, previously noted, to be designated as the District Council in this report; the record reveals that it has maintained that affiliation. This organization has been identified for the record, in turn, as an unincorporated association of local labor organizations, chartered by the United Brotherhood of Carpenters and Joiners of America; at all times material, I find, it has been engaged in the promotion and protection of the interests of employee members of its constituent local unions. Specifically, I find, it has represented the Union and its other constituent locals in labor disputes and collective bargaining negotiations with Association committees, as previously noted, and

various Association members and other lumber industry employers.

(There is testimony in the present case that authority to negotiate with the Association, its member firms and other lumber industry employers in the Union's behalf, with respect to wages specifically, had been given to the District Council in 1948 pursuant to the formal instructions of the Union membership; witnesses connected with the Union testified, without contradiction, that its grant of authority had not been limited in duration, and that it was still effective at the time of the events immediately involved in this case. The record shows, in this connection, that the Union, at its meeting of February 4, 1948, had authorized the Union's secretary to notify the District Council of its desire that the Council continue negotiations with the operators for a wage increase, in excess of the sum embodied in a pending offer. Pursuant to these instructions, I find, the Union's recording secretary had, on February 5, 1948, advised the Willamette Valley District Council that it was "instructed" to continue negotiations for "further increases" in wages. Copies of his letter may have been sent, also, to firms under contract with the Union; as to this, however, the record is not entirely clear. Although the motion adopted by the Union, previously noted, and its letter, would seem to have been limited, in their context, to a grant of authority with respect to negotiations for a 1948 wage increase only, the representatives of the Union and the District Council apparently construe them as an indefinite grant of

authority to the Council, at least with respect to the negotiation of general wage issues. Such a construction, when shared by the purported principal and agent involved, would seem to be immune to challenge, at least on the part of a stranger to the relationship. I find, therefore, that the District Council was, at all material times, the designated agent of the Union and its membership, in the wage negotiations now to be noted.)

D. Preliminary Negotiations

On February 10, 1954, Eldon Kraal, the executive secretary of the District Council, dispatched a form letter to the Respondent under Article VIII of the Union's agreement with the firm. It read as follows:

Please be advised that the Willamette Valley District Council wishes to notify you that we wish to open negotiations for an increase of wages for all of your employees who are represented by our union.

We will appreciate the opportunity to discuss this matter with you or your representatives at an early date. (Emphasis supplied.)

Copies of the same letter appear to have been sent to a number of other Willamette Valley lumber operators under union contract. I so find.

(The testimony of Executive Secretary Kraal establishes, without contradiction, that approximately 79-80 operators maintained contractual relations with constituent locals of the District Council,

at the time, and that all were served with wage demands.)

In a letter dated February 20, 1954, the District Council was advised by the Respondent that its letter of February 10th had been received. The firm's response went on to declare, however, that the District Council had no status as the "bargaining agent" of its employees, with authority to open negotiations on any subject. In reply, on March 10, 1954, the Respondent was advised by letter—over the signature of Leland James Howden, the Union's financial secretary and business agent—that the District Council had been authorized by the Union to "open and negotiate" wage issues in its behalf; that the Council was still authorized to do so; and that it would continue to hold such authority in the future in the absence of any contrary indication on the Union's part. Howden expressed the hope, therefore, that the Respondent would, in the near future, enter into negotiations with the District Council in regard to the wage issue.

(There is a suggestion, in the record, that various other lumber operators in the Willamette Valley, upon receiving the District Council's letter of February 10th, had expressed their doubts—as the Respondent had—with respect to the authority of the Council to open negotiations on the wage issue. Notes similar to the Union's letter of March 10th, previously cited, were sent, I find, to a number of employers.)

On April 9, 1954, the executive secretary of the District Council addressed another form letter to

the Respondent—and presumably to various other employers—calling attention to the Council's earlier February letter as one in which that organization had "requested a meeting" with the firm or its representatives to discuss the matter of a wage increase for all of the employees the union represented. In the absence of any negotiations prior to the 9th of April, the Respondent, among others, was advised that its attitude had led the Council to conclude that it was involved in a refusal to bargain in good faith with authorized Union agents. Again, on behalf of the District Council, Executive Secretary Kraal requested that he be given an opportunity to meet and discuss the matter of a wage increase at an early date.

Subsequently, on April 13, 1954, the Respondent dispatched a letter to the District Council signed by Sam E. Hughes, its labor relations director. The letter read as follows:

We have your letter of April 9, 1954. We fail to find in your letter of February 10, 1954, a request, as alleged, for a meeting to discuss a wage increase for our employees.

You are hereby notified that we are authorizing a committee of Willamette Valley Lumber Operators Association to represent us, until further notice, in the discussions contemplated by your letter. You are further notified that the Association's committee is not authorized to reach any agreement binding upon us and that conclusions reached jointly by it and the authorized representatives of

our local union are to be submitted to us for consideration.

Thereafter, on April 28, 1954, and possibly as a result of this letter, negotiations between an Association committee and the Council with respect to the wage issues then in controversy, began.

(A copy of the letter quoted appears to have been sent to the Association. I so find. Insofar as the record shows, this communication constituted the only objective evidence available to the Association or any of the parties with respect to the Respondent's designation of the operator's group to represent it in the 1954 wage negotiations.)

At the time, I find, Natale Bernard Giustina, the Respondent's president and general manager, was a member of the Association's board of directors—and had served as one for five or six years. Sam E. Hughes, the Respondent's labor relations director, was appointed to the Association's negotiating committee; on April 28, 1954, he was a member of the group which met with the District Council's representatives, as noted.

E. The Prelude to the Strike

Various references in the record suggest that the negotiations thus initiated by the Association and the District Council, with respect to the wage issue, were part of a larger series involving other operator associations, other organizational units of the Lumber and Sawmill Workers, AFL, the International Woodworkers of America, CIO, and various employers whose employees were repre-

sented by one or another of these “rival” labor organizations.

(At the time, I find, it was a matter of common knowledge in the Pacific Northwest that wage issues in the lumber trade were being negotiated on an “industry-wide” basis, and that practically every employer in the trade, privy to a labor agreement with an AFL or CIO organization, had been confronted with a wage demand. These negotiations were extensively discussed, in the local press and elsewhere. I find it appropriate, therefore, to take official notice of the fact that the Respondent’s indirect involvement with the Union—as previously indicated—constituted a part, only, of the larger series of negotiations, to all intents and purposes “industry-wide” in scope.)

As of April 26, 1954, I find, the Respondent had instituted a second shift at its Eugene sawmill and planing mill. And some questions arose, apparently, with respect to the “seniority” and employment rights of employees transferred or assigned to the second shift by the firm, and the disposition to be made of their claims with respect to further employment, in the event of a termination of the shift.

(The testimony of the firm’s production manager establishes that the second shift operation required almost as many men as the established first shift.)

On June 7, 1954—while the wage negotiations were pending—representatives of the Respondent and the Union met, at the request of the latter, to dis-

cuss certain grievances and the second shift problem. The Union, as the record shows, had previously presented a prepared "Memorandum of Understanding" as its proposal with respect to the second shift issue.

(The evidence establishes, beyond dispute, that this memorandum had been grounded in a Union acknowledgment that the second shift would be on a "temporary" basis. I so find.)

There is some evidence in the present record that the Union's proposal was discussed. No information with respect to its fate, however, is available.

(Hughes, as a witness, took the position that the proposal became "moot" when the Respondent reached its decision, later, to discontinue the second shift, and that the firm, therefore, never had to discuss it.)

In the course of the discussion, however, the Union's demand with respect to a wage increase also appears to have been mentioned. Sam Hughes, I find, attempted to explain, at length, why the Respondent would not be able to meet the Union's demand; the record, however, gives no indication of any reply by a Union spokesman. And at some point, apparently, Natale Giustina raised a question as to whether the Union negotiators were free to discuss the wage issue. He was advised that they could not do so, since their authority to negotiate with respect to such matters had been "given" to the District Council of their organization. Giustina was also taxed, I find, with his own inability to

negotiate. Upon his declaration that he was “ready, willing and able” to negotiate, the Respondent’s president was advised by a Union spokesman that he had given authority to negotiate the wage issue to the Association, and that he could do nothing about it. The testimony of Natale Giustina with respect to his reply, which I credit, reads as follows:

* * * I said, “The hell I can’t. The association doesn’t tell me or any other operator what we have to do,” and I repeated, “All I have to do is pick up the telephone and tell Mr. Metzger of the association that he no longer represents me, and that I am at this moment, ready, willing and able to negotiate,” if they wanted to talk.

The record reveals no response on the part of a Union spokesman, however, beyond the possible reiteration by Business Representative Howden of his earlier statement that the Plant Committee of the Union could not undertake negotiations with respect to the wage issue. Nor is there any indication, in the record, of any overt action by the Respondent calculated to effect an actual revocation of the Association’s authority to negotiate on wages for the firm.

On June 11, 1954, according to the undisputed testimony of Sam Hughes, which I credit in this connection, Business Representative Howden—in a further conversation at the Respondent’s plant—reiterated the Union’s position with respect to its inability to negotiate the wage issue directly.

(In substance, I find, Hughes was advised that if the Respondent persisted in its attempt to negotiate the wage issue with the Union's Plant Committee, without regard to the District Council's "right" to negotiate such questions, there might be a strike prior to the deadline previously announced.)

Thereafter, on the 17th of June, representatives of the District Council and the Association met to renew negotiations with respect to the wage issue. Hughes, as a member of the Association committee, was present. The record is silent, however, with respect to the discussion which then eventuated.

On the 20th, Natale Giustina was visited by Howden, in his capacity as a District Council emissary; he was asked if he wished to make a wage offer, which could be reported to the Council, and replied that there would be none. This appears to have ended, for the time, direct negotiation between the Respondent and any Union or Council representatives in regard to the wage issue.

(There were additional negotiations, I find, between the Council and the Association committee on July 13 and August 4, 1954. Despite the protestations of President Giustina as to the ease with which he could terminate the Association's status as his representative, the record establishes that Hughes sat as a member of the Association's committee on each of the occasions noted.)

F. The Strike

On June 21, 1954, the Union undertook strike action against the Respondent. Picket lines were

established at the premises of the Respondent in furtherance of the Union's wage demand. Insofar as the record shows, the pickets appear to have been orderly, and the picketing appears to have been peaceful, at all times. No contrary contention has been made.

(The record shows that the strike at the Respondent's plant constituted part of an "industry-wide" strike, so-called which involved every firm in the Pacific Northwest lumber industry under contract with an AFL or CIO affiliate, exclusive of any firms which had settled prior to the strike deadline on some basis acceptable to the particular labor organization representing their employees. I so find.)

On the 28th of June, at the instance of the Respondent, a conference was held with various Union representatives at the firm's Eugene plant. The record establishes that the Respondent was motivated by a desire to ascertain the wishes of the Union, and its employees, in regard to the deduction of "hospitalization dues" for the month of July from the final pre-strike pay checks of the employees, then in the process of preparation. An agreement that such hospitalization premiums might be withheld appears to have been readily reached. Business Representative Howden, I find, then declared that he would be willing to communicate a wage "offer" to the District Council of his organization. In reply, however, Natale Giustina announced that there would be no offer, except for a statement that the Respondent would be ready

and willing to resume operations on the basis of the wages and working conditions in effect when the strike began. Howden indicated that the District Council would not find such an offer acceptable. As the conference broke up, President Giustina, I find, asked Howden if the Union's contract with the Respondent was still in force, and Howden replied in the affirmative. On this note, the discussion ended.

(Giustina's testimony with respect to this exchange is couched in obverse terms; he claims that he asked whether Howden considered the contract broken, and that the business agent gave a negative reply. The variance may be dismissed as immaterial.)

On or about July 24, 1954, about thirty-five non-supervisory employees of the Respondent met at the home of one of their number, to discuss a petition that the Union call a special meeting and undertake action to have its bargaining rights with respect to the wage issue "returned" by the District Council; in the event of a failure to achieve this objective, the employees present discussed an attempt to return to work at the Respondent's plant despite the presence of the Union pickets.

(My conclusion that such a meeting occurred on or about the 24th of July is based upon the stipulation noted for the record, to which reference has previously been made. Independent evidence offered by the Respondent establishes that eleven Union members—a group including Alva Robertson and Glenn L. Winey, among others—presented

a written request, at or about this time, to the Union's president that a special meeting of the Union membership be held on the evening of Saturday, July 24, 1954, for the purpose of "withdrawing" the District Council's authority to represent the Union in the wage negotiations then current, and for the purpose of taking such other action as might be consistent and necessary under the circumstances. Temporal considerations, therefore, suggest that the written request may have been prepared prior to the 24th of July. No question has been raised, however, with respect to the exact date of its preparation; I find it unnecessary, therefore, to resolve any possible conflict between the stipulation and the evidence offered by the Respondent in this connection.)

On the night of July 28, 1954, the Union membership did meet. No action was taken, however, to "withdraw" the Union's earlier grant of authority to the District Council with respect to wage negotiations.

G. The Meeting at the Plant

After the Union meeting, I find, some of the Respondent's nonsupervisory employees, within the unit herein found to be appropriate for the purposes of a collective bargain, met outside the Union hall to discuss their problems with respect to the outcome of the meeting and the possibility of an attempt to return to work. One of them suggested that the conference be adjourned to the parking lot at the Respondent's plant. When the employees reached the plant premises, however—at about 9:30

or 10:00 o'clock—they found the door of the Respondent's machine shop, adjacent to its employee parking area, open. They entered the shop. Additional employees, I find, arrived subsequently.

(At least twenty-two employees, at one time or another, appear to have been at the shop. A stipulation of the parties, noted for the record, indicates that the number present fluctuated, from time to time, as various employees entered and left the shop.)

Some time prior to the employee assembly now under consideration, I find, a worker by the name of Alva Robertson, previously noted, had telephoned Hughes to advise him of the fact that such an assembly would be held at the Respondent's plant. The only available evidence with respect to the conversation between Robertson and Hughes indicates that Hughes was asked to be present at the Respondent's shop to "answer questions" which the employees might present.

(The testimony in question is that of Hughes. To the extent that it may warrant a conclusion that he was advised by telephone of the fact that a conference or assembly would be held at the plant, I find it credible. His indication that he was merely "invited" to be present, however, in order to "answer questions" may be subject to question as testimony of a self-serving character, under all the circumstances; an evaluation of the situation in this regard may appropriately be deferred, in my opinion, until the available evidence with respect to the

assembly, and his participation in the discussion which took place, is completely set forth.)

Hughes asked if he might bring Natale Giustina and his brother, Ehrman Giustina—the firm's production manager—with him. He was informed that he was free to do so. There is no indication in the record that he interposed any objection to the use of the Respondent's premises for an assembly of its employees.

The meeting was opened by Robertson; with the employees gathered about him in a semi-circle, he referred to the fact that they "knew" why they were there, and went on to report that he had called the "bosses" and that they would "come down" and be available for questions. According to the stipulation, previously noted, he then called Hughes; the latter, accompanied by Natale and Ehrman Giustina thereupon joined the assembly.

(The record does not reveal, definitely, where Hughes and the Giustina brothers were when they were called. There is some testimony, however, that they were in the shop, and in a position to observe employees as they arrived, before they were "invited" to join the assembled employee group. Upon the entire record, I am satisfied that they were already upon the plant property at least; there is no indication that any appreciable period of time elapsed prior to their appearance, with Robertson, at the head of the shop group.)

Before the discussion began, Hughes asked whether everybody who had been invited was present. He was assured that "just about" everyone was there.

(Hughes testified that he had no recollection of any such exchange. Three of the General Counsel's witnesses, however, attributed the inquiry noted to him, in words or substance. And upon the entire record, indeed, such an inquiry would seem to be consistent with his character and the general tenor of his remarks, as revealed in the stipulation previously noted. I find that he raised the question noted, and received an affirmative reply.)

Robertson, however, interrupted to observe that a few employees were present who should not have been there. He requested a conference with Hughes and Ehrman Giustina, and the men, I find, engaged in a brief consultation. Hughes then returned to his position at the "head" of the assembled employees.

(Robertson's reference to the fact that some employees were present who should not have been there, I find, involved four employees present at the invitation of Clifford Johnson, a nonsupervisory worker: Dean E. Sparks, G. Lewis Wright, Orville Bloom, and Johnny Zybach. Their testimony, which I credit, establishes that Johnson had invited them to attend the assembly at the Respondent's plant, shortly after the adjournment of the Union meeting previously noted. In the light of the available evidence, I find that Johnson had referred to the assembly as a "secret meeting" to be held

in the machine shop, adjacent to the parking lot, at the Respondent's plant.)

Turning to the individuals designated by Robertson, Hughes asked if they had been invited. He was advised by Wright that Johnson had extended their invitation. Upon receiving Johnson's confirmation, Hughes asked if everybody at the Union meeting had been invited. He was advised that no general invitation had been issued. Hughes then declared, I find, that:

Before we go any further, I want to state that it is my opinion anyone has a right to present his individual grievance provided the collective bargaining agent has had an opportunity to be present and I'm wondering if Howden knows about this meeting and has had an opportunity to be present if he desires.

He was advised by an unidentified employee that the Union's business representative could have been present if he had wished to attend.

(There is some testimony that Hughes went on to say that it would probably be a "good thing" if Howden were in attendance. Hughes denied any such statement. Upon the entire record and my observations with respect to the demeanor of the labor relations director as a witness, I credit his denial. There is also testimony that Hughes went on to observe, in words or substance, that, "There's no use kidding ourselves, fellows" and that the strike had gone on long enough and it was time to

do something about it. In view of the caution displayed by Hughes in every other context, however, when speaking in the Respondent's behalf—coupled with his meticulous efforts to be “exact” which frequently bordered on the captious—I find it impossible to credit testimony that he made such an open declaration of the Respondent's intent to “do something” about the continuation of the strike. His denial of the remarks thus attributed to him is credited.)

Robertson then suggested, I find, that some of the employees who were “new” to the “idea” which had prompted the assembly, and who had not been thinking about it very long, be permitted to talk. He did not identify the “idea” in question. In the light of his suggestion, nevertheless, Hughes asked the men if they had anything to say. There was no reply. At this point, however, Hughes did not relinquish the assembly's attention; instead, I find, he embarked upon extensive remarks. By stipulation, it has been agreed that he began as follows:

Very well. I sincerely hope that none of you have come here with the intention of just listening to what is going on and then reporting it back to the hotshots. There's an operation up near Bellfountain where they had a couple of men who ran to the District Council every time they heard something; they have a name for those fellows, they call them rats. I hope none of you are going to be called rats by the

fellows you work with. Now, if any of you want to leave I'm sure it will be satisfactory to everyone else. Well, I'm sure I don't need to tell you what will happen to you in the future.

Robertson then indicated by words and gesture that anyone who did not wish to go to work might leave. The record does not establish however, that any employee did. At this point therefore, after giving the Johnson invitees a thorough scrutiny, Hughes said, "Very well, we will assume everyone here feels as you do" and embarked upon the body of his remarks. He disclaimed any intention to "knock" the Union, declaring that it had done the people of the Willamette Valley a great deal of good. He expressed the conviction that the Giustina brothers felt the same way, and that the Respondent did not wish to "break" the Union. Hughes went on to point out, however, that the Union leaders had a "tremendous responsibility" to the members of the organization, by virtue of the power inherent in their position, to "dictate the lives" of several thousand men, and that they ought to be conscious of their responsibilities in that regard. In this connection, according to the stipulation, Hughes described the current strike as an "entirely uncalled for" action. He referred to the cost of the strike to the employees involved, and pointed out that all of the strike settlements negotiated with particular employers since its inception had been for a lesser sum than the Union's original wage demand.

After a reference to the fact that the Respondent's management, allegedly, could have lowered the wages of its employees by five cents, and then settled on the basis of a fictitious five cent raise, Hughes went on to say that the Respondent would take no such course. In this connection, I find, he declared that:

We are going to be honest with you. We are not going to make an offer, and we are not going to try to make you think you are getting something when you are actually getting nothing. That is not the way we operate. We are going to lay the cards flat on the table.

The labor relations director went on to explain that the market for the Respondent's product was poor, and that prices were low. Referring to the fact that the Respondent's "gypo" competition could operate profitably under the market conditions then current, starting and stopping operations in the light of the market situation, Hughes declared that the Respondent, too, could see its way "clear" to increase wages if it did business in the same fashion. He advised the employees, however, that the Respondent thought it more important to be able to keep a good crew by paying a "fair" wage and providing "steady" work.

At this point, I find, Hughes declared that management representatives in the Willamette Valley, in general, had done an "awfully poor job" of keeping workers informed as to their individual rights and their liberty to do as they wished. In this connection, also, he went on as follows:

Remember, as I've told most of you while you were on picket duty, generally a man has a right to strike or not to strike as he sees fit, to engage in concerted activities such as a strike or refrain from them, and neither the Union nor the employer can discriminate against the man for his actions. The Taft-Hartley Act is your protection and provides this and is still the law of the land. In the first place, the Union cannot keep you from working if you want to.

At this point, according to the stipulation, President Giustina interrupted to remind the men of their "individual rights" under the Constitution; he declared that:

It is the rights of the individual that we think is important. Your rights as a man to work where and when you want to. No union can make you go out to strike. On the other hand every man also has the right to strike if he wants to. Any individual working in the mill can go on strike and we can't do one thing about it. He can tell us to go climb a tree. But if he didn't want to strike, nobody can make him. He has a right as an individual to keep on working.

One of the employees raised a question as to the Union's strike vote—to which Hughes replied that he did not have much "respect" for the vote, since it had only carried by a small majority and since no more than 20 per cent of the Respondent's plant

employees had voted for strike action. He went on to explain these observations, I find, with a detailed reference to the strike vote figures. After pointing out that only 82 of the Respondent's 250 eligible employees had voted, Hughes applied the overall percentages revealed by the poll results and deduced that approximately 52 of the Respondent's employees must have voted for the strike while 30 voted in opposition; he concluded that those who had voted for the strike represented only 20 per cent of the Respondent's crew, and declared himself unwilling to believe that the wishes of this percentage of the crew represented the "wishes and desires" of the entire group.

With a disclaimer of any "hard feelings" on the part of the Respondent, however, and a declaration of personal respect for Business Representative Howden, Hughes then concluded his formal remarks.

At this point in the discussion Orville Bloom, one of the Johnson invitees, raised a question as to what would happen to the returnees when the strike ended; specifically, I find, he asked what would happen if any Union men rehired upon the termination of the strike refused to work with men who had returned to work earlier. Natale Giustina reassured him, in effect, that the Respondent would be "tough" in resisting such a development. An unidentified employee then observed, however, that if the men present went back to work they would be "through" with the Union. Hughes, in reply, declared:

No, you're not. . . . Now all you have to do to it walk up to one of the committee and offer your money to him. If he doesn't take it, the union can't kick you off the job.

Bloom then asked about the pay the returnees would receive. He was advised by President Giustina that the Respondent intended to maintain the wages, hours, and working conditions in effect at the start of the strike. Giustina added, however, that the Respondent would like to pay its employees on the basis of their ability, but that the status of the Union as the representative of the employees precluded it from doing so. Bloom then asked if the men would continue to enjoy the other rights and advantages they had gained through the Union, if they returned to work. President Giustina, prompted by a reference to the Respondent's veneer plant, responded as follows:

Look at the veneer. All right, they've got everything you've got, except seniority, and they don't want that. The best man gets the job and they're happier that way. Seniority is out.

The stipulation previously noted for the record, which attributes these remarks to Natale Giustina, gives no reliable indication as to whether his last observation was intended to be descriptive of the situation in the veneer plant, or a forecast of change with respect to the Respondent's sawmill seniority policy in the event of a resumption of operations. And since the record as a whole affords no alternative basis for a choice of one interpreta-

tion in preference to the other, any invidious inference as to the significance of Giustina's remark would seem to be unwarranted.

At this point, however, an unidentified employee asked why the District Council did not wish the men to return to work. Hughes undertook to reply; he advised the men that the members of the District Council were not thinking about them but about the organization's income of \$4 per month from each man, or about \$900 per month from the Respondent's employees. Specifically, I find, he declared:

That's right. All they're worried about is their nine hundred dollars a month. That's what they take out of this plant. They're just thinking about their jobs.

An unidentified employee, according to the stipulation, then raised the rhetorical question, "If they can think about their jobs, why can't we think about our jobs." And Natale Giustina, I find, declared, "That's it. That's the whole thing right there." A further question was raised as to whether the employees present could withdraw from the District Council or, better still, form a "new union" of their own. At this point, however, Hughes interrupted to advise the employees that:

Now, just a minute. Pardon me, Nat, let me say a few words just here. This is not the time nor the place to discuss anything like that.

There is testimony, offered in the General Counsel's behalf, that Hughes then declared, in words or sub-

stance, that, "I think it would be better to just use our individual rights and go back to work like we've planned." Hughes and President Giustina however, with support from the firm's production manager, vigorously denied any such remark. Dean Sparks—the employee responsible for the notes upon which the stipulation herein previously quoted, at length, is based—did more than testify that Hughes had made the quoted remark in substance; he insisted, as a witness, that Hughes had spoken in the first person plural. In the entire context of the case, however, and upon my observations with respect to the demeanor of the Respondent's labor relations director, I find this testimony incredible, and the denials of Hughes and the Giustina brothers more worthy of acceptance. It is so found.

An unidentified employee, I find, then requested that the men get "this thing" started. He did not identify his reference. Hughes, however, suggested that he and the Giustina brothers would withdraw from the shop, and they did so. Robertson then requested a show of hands on the part of those present who wished to return to work. The stipulation suggests, and I find, that a majority of those present indicated a desire to participate in the "back-to-work" movement. At this point, therefore, an unidentified employee raised a question as to whether the group wished to return to work in the morning, or at the outset of the following week. A show of hands was again requested, and Robertson then announced that the men would go to work

the next morning. A division was demanded, however, and Robertson asked all of those who wished to return to work in the morning to step to one side. The results of the division, apparently, confirmed the decision previously indicated; Robertson announced that the men would go to work in the morning, and suggested that they see the management. Hughes and the Giustina brothers were asked to return to the shop, and Robertson reported that most of the men wanted to come back to work in the morning, if the Respondent would let them. President Giustina, I find, observed that there was plenty of work, and that the management would see the men in the morning, when the whistle blew.

(The stipulation previously noted, upon which most of my conclusions have been based, indicates that Robertson's efforts to promote a decision with respect to a possible resumption of work by the employees was accompanied by an attempt to characterize the four Johnson invitees, previously noted, as men who had come to the shop to start trouble. Wright and Bloom, however, protested that they had come in quest of information, and that they had not understood themselves to be under any obligation to accept the idea of an immediate return to work, when they came. Robertson, I find, told them, in substance, to leave the shop if they did not like the idea of a return to work. Upon Wright's further protest, however, he apparently abandoned his attempt to force their departure, and the record shows that he proceeded with the vote already described. When an unidentified em-

ployee suggested, nevertheless, that the men ought to wait until Monday, before returning, Robertson declared that the men who were not ready to go to work immediately might as well leave the assembly. At this point, I find, Wright again pointed out that some of the men might need additional time to consider the matter, and Robertson finally called for the show of hands previously noted, on the issue of an immediate return as opposed to a return at the outset of the following week. Although the cold record, in this connection, provides no clear-cut evidence as to Robertson's attitude, and the manner in which those polls were conducted, the tenor of the stipulation as a whole would certainly seem to warrant an inference that Robertson, personally, favored a return to work at the earliest possible moment, and that his conduct as the unofficial leader of the discussion effectively projected his views in this connection. It is so found.)

While the assembly was in the process of dispersal, the Respondent's management representatives were accosted, outside of the shop, by the Johnson invitees; they were advised that no one had come to the meeting with a desire to cause "trouble" and they informed the invitees, in return, that they felt it had been a good thing to "lay" their "cards" on the table, and that they held no "hard feelings" against anyone as a result of the night's development.

On July 30, 1954, apparently as a result of the assembly noted, the initial charge in the present

case was prepared and submitted to this agency. It was docketed, I find, on the 2nd of August; a copy of the unfair labor practice allegations was mailed to the Respondent on the 5th and received on the 6th of that month.

H. The Resumption of Operations.

In the meantime, as of the 29th of July, a sufficient number of strikers had reported for work to enable the Respondent to resume partial operations. On August 5, 1954, therefore, the Respondent sent a letter to all of the employees who had gone on strike and not returned. In it, the firm's employees—among them, the second shift workers—were advised that:

Operations at our plant in Eugene were resumed July 29, 1954. Some of you have not returned to work. We plan to continue our Eugene operations. If you have not returned to work by Monday, August 9, 1954, to start the regular day shift, it will be considered that you have severed your employment and we will look to others to fill the jobs.

Subsequently, additional employees who had been on strike returned to work at the Respondent's plant; with a certain number of new employees, these returned strikers enabled the Respondent to establish and maintain its Eugene operations at a substantially "normal" level—on one shift.

(On the 8th of August, at a meeting of the Respondent's crew, those present voted 71-12, to return to work only as a "group" under the sponsorship of their union. The picket line was continued.)

On the 25th of August, also, a petition for the decertification of the Union at the Respondent's plant was docketed at the Board's Sub-Regional Office in Portland, Oregon; it had been prepared and filed, I find, by one of the Respondent's workers, Glenn L. Winey, and a group of associated employees. The Respondent, I find, received a copy on the 27th of August. The petition called for the decertification of the Union as the bargaining agent of the production and shipping employees of the Respondent's sawmill operation at Eugene, Oregon, exclusive of guards, clerical and supervisory employees. It cited April 1, 1955, however, as the expiration date of the Union's then current contract with the respondent employer.

A copy of the petition was mailed to the Respondent. Subsequent to August 26, 1954, on a date not set forth in the record, it was received and read by the firm's labor relations director.

I. Attempts to Settle the Strike.

The previously noted "industry-wide" strike in the lumber trade was still current. On August 26, 1954, in consultation with the Governors of Oregon and Washington, representatives of the industry and the interested unions agreed upon a procedure calculated to eventuate in a strike settlement.

(For approximately two weeks prior to the announcement of this agreement it was common knowledge, known to the Respondent, that the Governors of the two states affected were involved in an effort to find a formula which would end the strike. The fact that an agreement on a formula

had been reached was published on August 27, 1954; it came to the Respondent's attention, I find, on that date.)

In substance, the parties agreed, consistently with their negotiating authority, to take certain action themselves and to recommend certain action to their principals. Among other things, I find, they agreed upon the appointment of a Fact Finding Board to investigate the "industry" issues involved in the strike and to report its findings to both parties. Pending the board's report, they agreed to recommend that all crews be returned to work as soon as practical, and that the parties refrain from discrimination against any employee, employer, or union member for conduct since the inception of the strike. The parties to the agreement also agreed to require a report by the board within 90 days, unless they granted it an extension; the agreement also required the board to release a public statement as to its findings of fact:

* * * in the event that any of the parties fail to accept and act in accordance with any findings or recommendations of the board or panel.

The signatory parties also agreed to recommend that any wage increase, which might result from the fact finding procedure agreed upon, be paid retroactively from the date on which the employees resumed work. The agreement, insofar as it affected the Union and the Respondent, concluded with an endorsement, as follows:

The Representatives of the Lumber Operators and the Lumber and Sawmill Workers, American Federation of Labor, recommend that the above stipulation be endorsed by the individual employer and the Union.

On August 31, 1954, Business Agent Howden and other Union representatives presented a copy of the Governors' Proposal to the Respondent's management as the basis for a strike settlement. Hughes asked if it was the Union's desire to "negotiate" on the basis of the proposal. Answered in the affirmative, he characterized the proposal as inapplicable with respect to the Respondent's employees, and went on to explain:

In order to bring any of you fellows up to date, I would like to tell you that under date of August 26, 1954, this company received notification from the NLRB that a petition for decertification of Local 2611 as the collective bargaining agent for the employees in the plant had been filed. * * * Inasmuch as your position as bargaining agent has been questioned by the employees working in this plant and we have been officially notified of this by the NLRB, until that question is resolved we do not feel it is proper to negotiate with you.

Hughes was asked if the Respondent would negotiate with the Union if there were no question as to its status as the exclusive bargaining agent of the firm's employees, and replied in the affirmative. On this note the meeting ended.

On September 2, 1954, however, the Union received a letter, signed by President Giustina of the Respondent, which read as follows:

You are notified that the Collective Bargaining Agreement between Local Union 2611, Lumber and Sawmill Workers and this company is terminated.

In reply, on September 13, 1954, Business Agent Howden dispatched a letter to the Respondent calling its attention to the fact that its trade agreement with the Union could only be terminated in accordance with the provisions of Article XIII, previously noted, and that the agreement therefore was still in effect. On September 16, 1954, the Union also filed its first amended charge in the present case, alleging 8 (a) (1) and (5) unfair labor practices on the basis of the Respondent's entire course of conduct prior to that date.

The Union's regular monthly meeting, held on the 14th, had not led to any formal action, on the basis of the Respondent's earlier conduct, by the membership. At a special meeting about two weeks later, however, the Union members voted to accept the Governors' Proposal as the basis of any settlement with the Respondent on the wage issue. No announcement, however, was sent to the firm.

In due course, on December 6, 1954, the Regional Director of the Board notified Glenn L. Winey and his associates that the decertification petition they had filed would be dismissed:

* * * inasmuch as the collective bargaining agreement currently between the company and Local 2611 of the Lumber and Sawmill Workers, AFL constitutes a bar to investigation of representatives at this time * * *

Copies of the letter were dispatched to the Respondent, the Union, and their respective attorneys, among others. The petitioners were advised, by the Regional Director, of their right to obtain a review of his dismissal action by the presentation of a request for such review to the Board, and the service of a copy of any such request upon the other parties, within ten days after the receipt of the above-indicated dismissal notice. The record establishes that such a request was filed.

On December 22, 1954, the Governors' Lumber Fact Finding Board issued its report with respect to the issues in the Pacific Northwest Douglas Fir Lumber Industry strike. It referred to the history of the dispute between the AFL and CIO unions and the various employers involved, the scope of the union demands, and its recommendations with respect to the wage adjustment and related issues. Substantively, it found that a "moderate increase" in basic wage rates with respect to all classifications would be appropriate, and recommended that an increase of 7½¢ per hour should be granted by the employers involved, effective from January 1, 1955, to April 1, 1956; in consideration of the proposed increase, it recommended that all of the other issues involved in the strike be considered resolved.

J. Renewed Negotiations.

On January 4, 1955, the Respondent, over the signature of Sam Hughes, addressed a letter to the Union suggesting that negotiations be resumed, in view of certain "new matters" which had developed since their August conference. The Union was invited to set a meeting date; it was advised, however, that:

Neither this letter nor any meeting shall be construed to have any effect upon the representation proceedings filed by Mr. Winey and Associates.

Pursuant to the Respondent's request, a conference was held at the plant on January 8, 1955; Sam Hughes and the Giustina brothers attended for the Respondent, while Business Agent Howden and District Council Secretary Kraal represented the Union. No representatives of the Willamette Valley Lumber Operators Association were present in a representative capacity.

(A transcript of the conference discussion has been made a part of the record. No testimony calculated to supplement or modify it was offered. My findings with respect to the conference, therefore, may be taken as bottomed upon undisputed evidence.)

Kraal, I find, opened the discussion with an inquiry as to the nature of the matters the Respondent wished to discuss. Hughes, in reply, declared that:

The meeting, as I say, is held at the request of the company. And we wish to make clear, the hold-

ing of this meeting is not a waiver on the part of the company of any question of representation that has been raised by any employee in this company, or group of employees by means of a decertification petition, or any other matter brought before the NLRB. The company wishes you to be informed that the new developments we make reference to, are first of all the 7½ cent an hour pay increase which is being effectuated in a portion at least of the industry, and has been placed in effect in most other employer's operations that we have knowledge of. Secondly, as you may, or may not, know a recent decision of the National Labor Relations Board has reversed a prior holding and well-established rule of the Board to the effect that if there was a representation matter raised, a question raised concerning the status of an incumbent union, it was an unfair labor act for the company, the employer, to negotiate with the incumbent union. That is the other new development that I wish to make clear, and have the record show, and reference is made to that new development as the purpose of this meeting.

(The decision cited by Hughes, I find, involved the William D. Gibson Co., Division of Associated Spring Corporation, 110 NLRB No. 88, 35 LRRM 1092, in which this agency held that its well-established Midwest Piping doctrine would not be applied in situations where an employer, despite the pendency of a representation petition, contracted with a labor organization with status as an incumbent union actively representing its employees.)

Hughes went on to declare the Respondent's willingness to make a 7½ cent per hour wage increase effective for all of its plant employees, except those excluded from the bargaining unit under the statute, as of January 1, 1955, and asked if the Union had any objection. Howden, for the Union, countered with a tentative observation that any such increase ought to be committed to writing and signed, prior to its effectuation at the plant. Kraal, as the District Council's representative, pointed out however that it had been authorized to negotiate the wage issue on behalf of the local unions within its jurisdiction, and that it had several subjects which it would have to "get out of the way" before any settlement of the wage issue could be discussed. He pointed out, I find, that the Respondent had not been a party to any antecedent agreement to effectuate the recommendations of the Governor's panel. Hughes, however, declared the Respondent's readiness to effectuate a wage increase of 7½ cents per hour because it appeared to represent an established industry pattern, and in order to maintain the Respondent's competitive position with respect to other employers in the labor market. He agreed that the Respondent's action would not be based upon any prior commitment to adopt the recommendations of the Governor's Panel as a settlement formula. In reply, I find, Kraal went on as follows:

Well, I will make my position clear. I am not here to tell you you can, or you can't place it in effect. That is the company's business. You can do what you please about it, but it is

neither here nor there with the District Council until certain other questions have been taken care of satisfactorily. We are not here to discuss 7½ cents wage increase or anything else until other things are cleared up. We are not here to tell you that you can't do it.

When Hughes then pointed out that the Respondent had no trade agreement with the Council, and that its questions with respect to the effectuation of the wage increase had been addressed to the Union representative, Kraal identified himself as a District Council official "called" by the Union, and speaking in its behalf. As such, he reiterated his earlier statement, saying:

I said you just go ahead and run your own business as far as your wage structure is concerned here until you take care of such other matters between the union and the company, then we will be prepared to talk, as to wages. At the present time, we are not prepared to talk.

Upon the settlement of the "other matters" in dispute between the parties, Kraal indicated, the Union would be ready to discuss the applicability of the recommendations of the Governor's Panel, as noted.

When the discussion turned to the "matters" thus noted, Kraal referred, I find, to the fact that the strike at the Respondent's plant was still current; he referred, also, to the Respondent's antecedent refusal to negotiate as a cause of the strike, and

declared that it had committed unfair labor practices. These were characterized as the source of the "unsettled" questions. In response to a direct inquiry by Hughes, Kraal again refused to discuss the company's proposal with respect to a 7½ cent per hour wage increase, but declared that the Union would be happy to discuss it after the disposition of the other "disputed matters" noted. Howden, in effect, confirmed Kraal's statement with respect to the Union's position.

(At this point a digression appears to have entered the discussion. Hughes, I find, taxed the Union representatives with the fact that none of its Plant Committee members were present; he raised a question as to whether the failure of the Plant Committee to appear might be due to the fact that there were no persons eligible for committee membership and, alternatively, whether the absence of any committee representatives could be said to constitute an acknowledgment that no trade agreement was in effect. Each of these observations, however, was categorically denied.)

Upon Howden's observation that the Union had not had an opportunity to take an official position in regard to the acceptability of the recommendations made by the Governor's Panel with respect to a wage increase, he was asked to state his own position; he indicated, I find, that he would probably recommend acceptance of the recommendation, insofar as the Respondent and all other employers were concerned, if "certain other matters" could be

understood. When asked to be specific, Howden called for an admission by Hughes that the trade agreement between the parties was still in effect; Hughes however refused to make any such admission, and reiterated the Respondent's contention to the contrary. Howden then declared, I find, that it would do the Respondent "no good" to attempt an agreement on the wage issue in the absence of a contract. Hughes, according to the conference transcript, pointed out that the Union was still the collective bargaining agent of the employees—according to its own contentions—and that it would legally hold that status, without a contract. Howden, in reply, declared that:

* * * we will state that the contract is still in force, and we will have to stand with that opinion, that it is still in force, before any wage settlement.

In effect the Respondent was advised that the Union would take no position with respect to the proposed wage increase, in the absence of an acknowledgment by the firm that its trade agreement with the Union was still in effect.

At this point, I find, District Council Secretary Kraal asked why the Respondent had called upon the Union to confer with respect to the effectuation, of its proposed wage increase, instead of effectuating such an increase unilaterally, in view of its contention that it had no Union agreement. Hughes replied as follows:

* * * Your status as the collective bargaining

agent has been challenged. There is a question of representation which has been raised by a considerable number of employees of Giustina Brothers Lumber Company. * * * During the latter part of October or November, at least the latter part of 1954, the National Labor Relations Board has reversed its earlier policy of allowing a company, or employer to continue negotiating with an incumbent union. It is no longer an unfair labor act for an employer to negotiate with an incumbent union when a question of representation has been raised, either by employees, or another union. Bearing those things in mind, we addressed a letter to you, because of the recent wage increases that have been effected in the industry. * * * And it is our opinion that we would no longer be guilty of a possible unfair labor act by negotiating with you when your status has been challenged, as has been done in this case. This is why we desire to negotiate with you.

The Respondent, through its labor relations director, then declared its willingness to negotiate a new agreement if the Union so desired. There was no indication of any such desire. Kraal, however, reiterated the Union's position that it would be "incorrect" to discuss the matter of the wage increase currently; he denied that this position constituted a refusal to bargain with respect to the wage issue, and insisted that the other matters in issue between the parties—specifically, certain al-

leged unfair labor practices allegedly attributable to the respondent employer—would have to be settled satisfactorily first. At this point, accordingly, he was asked if there was “anything else” that he cared to discuss; the executive secretary replied, however, that he had nothing to discuss at the time, and was in attendance at the Respondent’s request. Nevertheless, I find, he declared his readiness to discuss “anything” at issue between the parties if a “reasonable settlement” could be reached. President Giustina and the Respondent’s labor relations director then characterized the Union’s position with respect to the proposed wage increase as a “refusal to negotiate” in regard to the issue. Their characterization was disputed by Kraal, who insisted that:

We just refused to take it up in the order that the company wishes it taken up in. We will take it up in a little different order. * * * And we will get the whole thing settled up.

When asked to define his concept of an appropriate agenda, Kraal insisted that the parties would have to discuss “the things that happened first” at the outset. Specifically, I find, he referred to the Respondent’s alleged unfair labor practices, and Howden cited the presence of the Union’s picket line, and the continued status of the strikers as company employees.

With respect to the latter issue, Hughes insisted, for the respondent employer, that all of the men still on strike had been replaced, and that they

were no longer employees. Howden, in reply, observed that there would be no useful purpose served by a continuation of the discussion if the Respondent's position in this connection was fixed. Kraal insisted however, in the Union's behalf, that the organization had no desire to await a determination with respect to its unfair labor practice charges by this agency, as a prerequisite to negotiations in regard to the wage increase; he declared, instead, that the Union was entirely ready to negotiate an amicable settlement with respect to all of the issues involved in the pending charges, and that it would then be willing to "come around" to the wage issue. He went on to reiterate:

* * * it just so happens that we have some other disputes between us here besides wages, and that is what I have been trying to say
* * * that we have got a little bigger job to do here than just to settle the wages now. And if we go at it in the way that I think we should, we will settle it in its order. We will settle those things that must be settled first and then we come up to the wages, and when that is settled, as far as I know, that is all the dispute that there is between us and the company.

Hughes assured the District Council representative that an agreement with respect to the effectuation of the wage increase would not be construed by the Respondent as a waiver by the Union of its rights or remedies under the National Labor Relations Act with respect to the unfair labor practice

charges. Kraal indicated that the Union's view was contrary, declaring that:

I would certainly consider it quite a waiver of several other questions, if we sit down here with you this morning and tell you, you go ahead and pay your scabs 7½ cents. We are just not negotiating for that kind of people you see.

Howden, at this point, returned to the Respondent's contention that the strikers had been replaced and were no longer company employees. He asked, in this connection, if it would be correct to assume that removal of the Union's picket line would not, in and of itself, lead to their reinstatement. And Hughes, in reply, declared that:

If you mean, Mr. Howden, if Local 2611 would remove the picket line and the men who were on picket duty would be brought back to the company and replace those men who are now working here, we are not willing to do any such thing at all * * * this company is not willing to discharge those replacements who are actively employed here at this time, in order that those persons who are on strike may return and once again become employees of this company. As far as future employment is concerned, obviously, at any time that a man desires to apply for work at this plant, he has a right to do so. If there is a job open at that time, we would certainly give anyone full consideration for that job.

At this point, Kraal, after a reiteration of his unwillingness to indicate acquiescence in the Respondent's wage increase proposal, invited its labor relations director to submit the proposal, in written form. Hughes gave no definite indication of the Respondent's intention, but suggested that the conference be recessed pending any "new propositions or proposals" to be advanced by either party. On this note the meeting ended.

On January 13, 1955, Labor Relations Director Hughes again dispatched a letter to the Union. He referred to the Respondent's earlier letter of September 2, 1954, and Howden's reply previously noted, and declared that:

In order that there may be no doubt, you are hereby notified that we re-affirm our notice of termination of that agreement.

The Union's reply, over Howden's signature, re-affirmed its position as stated on September 13, 1954, to the effect that the collective bargaining agreement between the Respondent and the Union could be terminated only in accordance with the provisions of Article XIII, and that it was, therefore, still in effect.

K. The Termination of the Strike.

On January 19, 1955, pursuant to formal action previously taken at a special meeting, the Union terminated its strike against the Respondent and withdrew its picket line. As of the same date, its representative delivered a letter to the Respondent, prepared on the basis of the Union's vote, which read as follows:

This is to notify you that Lumber and Sawmill Workers Local Union 2611 has taken action to terminate the strike of employees at your plant, and that the strike and picketing in connection therewith have been terminated. The union hereby unconditionally requests the immediate reinstatement of the employees who have been on strike.

This action on the part of the Union was followed by two additional letters to the company. The first of these—dated on January 21, 1955, and signed by 14 employees—contained a reference to the termination of the strike and an unconditional request for reinstatement, as of the letter's date. On the following day a letter of similar import was signed by 27 strikers and dispatched to the respondent employer. The Respondent's reply, prepared by Hughes and dated as of the 22d of January, was addressed to the Union and marked for Howden's attention; it acknowledged receipt of the Union's letter of January 19, 1955, with respect to the reinstatement of the strikers, and reported the absence of any "vacancies" at the Respondent's plant.

On January 25, 1955, the Respondent sent identical letters to the Federal Mediation and Conciliation Service and the Oregon State Board of Conciliation to report that it had given notice of termination of its contract with the Union and that no new agreement had been reached.

On the 26th of the month the Union's second amended charge in the instant case, characterizing

the Respondent's refusal to reinstate any strikers as an unfair labor practice, was filed.

L. Subsequent Developments.

On March 8, 1955, the parties were advised by the Board that a Request for Review with respect to the Regional Director's dismissal action in regard to the decertification petition had been rejected, and that the dismissal had been sustained:

* * * on the ground that the Board, in conformity with its well-established practice, will not entertain a petition for representation while there is pending in Case No. 36-CA-633 a complaint alleging violations of Section 8 (a) (1) and (5) of the Act.

Insofar as the record shows, there have been no further contacts between the Respondent and the Union, except those incidental to the instant case.

Conclusions

A. The Issues

Essentially, it is the General Counsel's contention that the conduct attributable to the Respondent between the 28th of July and September 2, 1954, involved interference, restraint and coercion, directed against employees engaged in the exercise of rights statutorily guaranteed; with respect to certain aspects of the conduct involved, it is further alleged that the Respondent evidenced its failure or refusal to bargain in good faith with the Union as the exclusive representative of its employees in a unit appropriate for such purposes. Additionally,

it is contended that the Respondent's course of conduct converted the Union's economic strike into an unfair labor practice strike, which was thereafter extended and prolonged by virtue of the conduct in question, until its termination by the Union in January of the following year. The Respondent, it is alleged, then refused to reinstate strikers who presented unconditional requests for reinstatement, upon the termination of the strike, to their former or substantially equivalent employment. In the light of his antecedent contentions, finally the General Counsel argues in this connection that the Respondent's failure to take such action involved discrimination with respect to the employment tenure of the strikers, discouraged Union membership and concerted activity, and thus involved an unfair labor practice.

The Respondent, in substance, contends that its course of conduct between the indicated dates involved no unfair labor practice, and that the economic strike action originally taken by the Union, therefore, was never converted into an unfair labor practice strike. In the light of these contentions, it is further argued that the Respondent, under applicable decisional doctrine, retained its right to replace the strikers permanently and resume operations; that it did, in fact, follow such a course; and that no charge of discrimination calculated to discourage Union membership or concerted activity can properly be maintained against it on the basis of its January refusal to rehire the strikers, in the absence of vacancies as of that date. To a con-

sideration of the issues posed by these contentions, this report now turns.

B. The Strike

Did the participation of the Respondent's management, and its labor relations director, in the discussion at the meeting which preceded the back-to-work movement, under all the circumstances, involve an unfair labor practice? Upon the entire record, I am convinced that this question must be answered in the affirmative. Several aspects of the situation, as revealed in the available evidence, when "incisively analyzed" in their total context, have impelled me to this conclusion.

In the light of the entire record, it is true, there would seem to be no justification for a conclusion that the Respondent instigated the back-to-work movement among its employees, or that any of its management representatives sponsored or promoted the assembly which preceded its resumption of plant operations. The available evidence, however, would certainly seem to warrant an inference that the Respondent's representatives possessed advance knowledge as to Robertson's plan in that connection, and that they welcomed his activity.

(The contention of Respondent's counsel that the firm's management representatives were invited to the assembly, initially, after it had started, must be rejected as contrary to the record.)

In this regard it may be noted, for example, that Johnson, immediately after the adjournment of the

Union meeting on July 28, 1954, was able to invite four Union members to a meeting in the Respondent's "shop" and that the shop at the Respondent's plant was, in fact, open when the invitees arrived. Some of the benches in it, I find, had been arranged to accommodate an audience.

(The evidence establishes that interested employees assembled at the shop between 9:30 and 10:15 p.m. on the evening of the 28th. The record is clear, however, that the Respondent, then, had no second shift in operation. In the absence of a logical alternative explanation, I find it difficult to believe that the "shop" could have been opened at that hour, or that it would have been left open, without the knowledge and acquiescence of managerial representatives.)

Despite the Respondent's contrary contention, I find that its acquiescence in the use of the shop by the employees, under these circumstances, represented a departure from previous practice. It was stipulated, for the record, that the shop had been used for employee meetings in the past. Very few have been cited, however. And I am satisfied that these meetings, in the main, were held under the Respondent's auspices, for business reasons, and that any other employee assemblies in the "shop," to raise funds for needy workers, were held on the basis of permission previously secured. Since the assembly now under consideration would obviously have been considered unique, the failure of the evidence to reveal a request on the part of Robertson

for permission to use the "shop," or any permissive grant on the part of the Respondent's representatives, might itself suggest, at least, the consciousness of those involved that overt participation by the Respondent in the preliminary arrangements required might compromise the firm and endanger the success of any back-to-work movement. And finally, I find it worthy of note that the initial remarks of Hughes, at the assembly, reveal his antecedent awareness of the fact that attendance had, supposedly, been limited to those "invited" expressly. Such admitted knowledge on his part would clearly be incompatible with any current claim of surprise.

(Hughes, himself, in testifying as to the telephone call by which he learned of the assembly, admitted that Robertson had said nothing as to the subject about which the men wished to speak to him, and that he had merely garnered an impression that they wished to discuss a "controversial" matter, the duration of the strike. Whatever he knew about the organization and objectives of the gathering, therefore, could only have been acquired earlier.)

Upon the entire record therefore I am satisfied, and find, that the Respondent's managerial representatives possessed advance knowledge with respect to the likelihood of an employee assembly to be held at Robertson's instigation; that they were aware of the projected assembly's purpose or possessed sufficient information with respect to

Robertson's intent to warrant a belief as to his purpose; and that they acquiesced in the use of the "shop" at the Eugene plant for the meeting in the light of their knowledge as indicated.

The testimony of the labor relations director, taken at face value, would indicate that he had been invited to the assembly to "answer questions" for the employees. It is clear, however, that his actual role proved to be more than passive. Robertson and his non-supervisory employee associates may have been the instigators of the assembly, and the back-to-work movement, but it was Hughes, beyond and doubt, who "carried the ball" with respect to the latter objective, at least at the outset of the discussion. Upon the entire record, I am entirely satisfied that the Respondent, through its labor relations director, participated actively in the promotion of the back-to-work movement at the assembly. Among the aspects of the situation which have led me to this conclusion, the following may be noted:

(1) The inquiry attributed to Hughes at the outset, as to whether everyone invited was present, and his further inquiry as to whether Sparks, Bloom, Zybach, and Wright had been invited, bespeaks a concern with respect to the success of the assembly, and the achievement of its objectives, incompatible with any claim of disinterested participation.

(2) Despite Robertson's failure to state the purpose of the meeting openly, Hughes undertook to characterize it as an occasion for the presentation

of individual grievances, and raised a question with respect to Howden's knowledge of the assembly and his opportunity to be present. Upon the entire record, I am satisfied that his comment represented an effort to fix the course of the discussion in a fashion compatible with Section 9 (a) of the statute. Such an effort, again, bespeaks the existence of certain preconceptions with respect to the purpose of the meeting, and a degree of participation incompatible with any claim of passivity.

(3) After inviting comments—not questions—in deference to an antecedent suggestion by Robertson, Hughes took command of the meeting, and, as previously noted, embarked upon extensive remarks. At the very outset, also, he saw fit to comment about his hope that none of the men intended to “rat” upon their fellow employees, by reporting the tenor of the discussion to Union and District Council representatives. Although expressive of a “hope” that none of those present would render themselves persona non grata with fellow employees, his language clearly conveyed a threat that anyone who reported back to the “hotshots” would run the risk of such a reaction on the part of employees sympathetic to the meeting's objective, and that the Respondent wished possible dissidents to leave rather than incur such a risk. At the very least, these comments of Hughes indicate solicitude, attributable to the Respondent, with respect to the sensibilities of the sympathetic employees present. Such solicitude or concern on the part of an employer, when related to matters outside the field of his

legitimate interest surely warrants characterization as incongruous at least. "What's Hecuba to him or he to Hecuba?" See *Foreman & Clark, Inc., v. N. L. R. B.*, 215 F. 2d 396, 34 LRRM 2697. Manifestations of this type, in short, when attributable to a management representative, can only be taken as veiled threats—or, at the very least, as an indication of an employer's desire to advance an interest of his own.

(4) After Robertson seconded his suggestion that those not in sympathy with the unexpressed objectives of the meeting ought to leave, Hughes commented, "Very well, we will assume everyone here feels as you do." By this remark, and particularly by his use of the first person plural, Hughes indicated to those aware of the assembly's objective, the Respondent's direct involvement in Robertson's plan with respect to a return to work. The indication may have been subtle, but the evidence already available to the employees in regard to the community of interest between Robertson and Hughes, would certainly seem to have been sufficient to guarantee that it would not be lost. Every consideration of logic and human experience, indeed, would seem to suggest, ineluctably, that those listening to Hughes were fully apprised, at this point at least, of the fact that the Respondent was as much involved in the back-to-work movement as Robertson and his associates.

As the General Counsel has put it, the assembly was not accidental; all of the circumstances compel the inference that it had been prearranged by in-

interested employees and the Respondent's representatives. Even assuming, for the sake of argument, that the Respondent had not initiated it, there can be no doubt that it was dominated, in the final analysis, by Hughes and the Giustina brothers. I so find.

In substance, the Respondent's labor relations director advised employees that the strike then current was "entirely uncalled for" and costly to the workers involved. Hughes defended the Respondent's wage policy in relation to its market situation, and insisted upon the Respondent's intention to pay a "fair" wage and provide "steady" work. He reiterated advice previously given the strikers with respect to their individual rights of action, and their liberty to do as they wished with respect to work regardless of the strike situation; specifically, I find, he deprecated the significance of the Union's strike vote and, in effect, invited his listeners to dismiss it as unrepresentative, insofar as the Respondent's crew was concerned.

Upon inquiry, President Giustina stated the terms upon which work would be offered at the Respondent's plant in the event of a resumption of operations, indicated his desire to pay employees on the basis of their ability, and suggested that the men might be "happier" under an arrangement calling for the assignment of work on the basis of individual ability rather than seniority. In addition, I find, the men were advised that the Respondent would resist any refusal on the part of returned strikers to work with those returning while the

strike was current; they were told, in words or substance, that the regular tender of their Union dues would effectively insulate them, under the law, against any attempt on the part of the Union to have them “kicked off” the job.

These indications with respect to the Respondent’s employment policy were coupled with an attempt to belittle the motives of the District Council, with respect to the strike, as selfish—and with a suggestion that the employees would be well advised to “think about” their own jobs, at the Respondent’s plant, with equal self-absorption.

The remarks of Hughes and President Giustina, in their totality, then, amounted to something more than a tactical maneuver or the mere provision of information with respect to the status of the Union negotiations. Implicit in the entire situation, instead, was a direct appeal to the employees for the abandonment of their participation in strike action and concerted activity. Under comparable circumstances—see *The Stanley Works*, 108 NLRB 734, 735-736—the Board declared that:

While an employer may, without violating the Act, inform the employees of the status of its negotiations with a union, or even urge the employees to persuade union leadership to accept its last offer, an employer may not bypass the exclusive bargaining representative by dealing directly with the employees on bargainable subject matters. In this case, the Respondent appealed directly to the employees themselves

to accept the final offer, which the Union's membership had already rejected. * * * We believe that such conduct by the Respondent is tantamount to dealing directly with the employees on the issue of wages, in derogation of the exclusive status of the duly designated bargaining representative.

The instant case, upon the entire record, would seem to fall within the ambit of these principles. Cf. *The Texas Company*, 93 NLRB 1358, 1360-1362. The Respondent argues that it made no attempt to deal directly with employees; its contention is apparently based upon the stipulation of the parties with respect to the inquiry of Hughes, at the outset, as to Howden's knowledge of the assembly, his announced disclaimer of any intent to disparage or "break" the Union, and his suggestion that the shop assembly on the 28th ought not to be considered an appropriate time or place at which to discuss the formation of a new union. The available evidence establishes, however, that the employees present were reminded of their "individual" right to abandon the strike and return to work; that they were urged, upon several grounds, to "think" about their own welfare; and that, upon direct inquiry, they were informed of the wages, hours, and working conditions which would govern their employment. In their totality, I find, the remarks of Hughes and President Giustina amounted to a direct appeal to the employees to accept the Respondent's final offer—the maintenance of the status quo

with respect to all significant aspects of the employment relationship—which the Union’s designated representatives had rejected. This was tantamount to direct dealing with the employees on the wage issue then in dispute.

(The Respondent argues, in passing, that its conduct in urging and persuading the assembled employees to return on pre-existent terms involved nothing more than the exercise of its right to free speech; there can be no doubt, however, that direct dealing without regard to the representative status of the recognized bargaining agent of the employees involved a “verbal act” subject to statutory proscription.)

I find, therefore, that the course of conduct attributable to the Respondent, at the “shop” assembly, involved a violation of its statutory obligation to deal with the exclusive bargaining agent of its employees, only, and interfered with, restrained, and coerced its employees in the exercise of rights statutorily guaranteed.

The Respondent’s letter of August 5, 1954, to the first and second shift employees who were still on strike, clearly embodied a further suggestion that these employees abandon the Union and the strike. In the light of the situation created by the Respondent’s antecedent encouragement of the back-to-work movement, and its direct exposition of the terms and conditions under which operations would resume, the letter in question necessarily involved something more than a written statement of the

firm's intention to exercise a lawful right under the statute. Cf. *Kansas Milling Company v. N. L. R. B.*, 185 F. 2d 413, 29 LRRM 1082. The Respondent's representatives, as of July 28, had already initiated the course of conduct herein found violative of the Act, as amended—and the causal connection between that course of conduct and the extension of the strike, to be noted in detail elsewhere in this report, would seem to be clear. Under such circumstances, established decisional doctrines would seem to compel the conclusion that the Respondent had lost its right to treat the Union employees as economic strikers, and to notify them that, upon their failure to resume work by a definite date, the firm would exercise its statutory right to replace them. Cf. *Kerrigan Iron Works, Inc.*, 108 NLRB 933, 935-936. And I so find.

In considering a communication closely comparable to that now before us, in language and import—see *United States Cold Storage Corporation*, 96 NLRB 1108 at 1109-1110 — this agency declared that:

Failure to work during the pendency of a strike cannot be construed as a termination of employment. Without notice of severance on the part of the striking employee, a termination can be effectuated in these circumstances only by the Respondent. Hence, conditioning the termination of the strikers upon their failure to act at the Respondent's request, stands as a specious attempt to shift the responsibility

of termination from the Respondent to the striking employees.

When such conduct involves something more than isolated action — and constitutes, instead, an integral part of a developing pattern of opposition to the purposes of the statute, as herein found — it can only be characterized as an unfair labor practice. *L. C. Everist, Inc.*, 103 NLRB 308, 310; *United States Cold Storage Corporation*, *supra*; Cf. *Kerri-gan Iron Works*, *supra*; *N. L. R. B. v. Clearfield Cheese Company*, 213 F. 2d 70, 34 LRRM 2132, 2133, 2135, *enf'g* as modified 106 NLRB 417. I so find.

The Respondent contends that the letter ought not to be construed as tantamount to a notice of discharge. It is argued that it contained no “solicitation” with respect to the abandonment of the strike, that it contained no “threat” of adverse action on the Respondent’s part, and that the strikers were merely put on notice, by its terms, that they would be subject to replacement if they chose not to return. These arguments, however, amount essentially to a play on words; they may be equated with a contention that the employees could not be expected to draw any inference, even one of the most obvious character, from the language which the Respondent chose to employ. If its representatives had not expected the employees to draw such an inference, and to act accordingly, the letter would have been a mere gesture. I cannot accept a contention, in effect, that it was so intended. Employees

in receipt of such a letter, I find, could reasonably be expected to assess its significance in the light of the Respondent's antecedent effort to encourage a back-to-work movement, and to deal directly with prospective returnees. When so considered, its essential significance as solicitation with respect to the abandonment of the strike, coupled with a threat to the employment status of those oblivious to its implicit appeal, would seem to be patent.

(This characterization of the letter as involving a threat, however, need not rest upon inference alone. When asked, at the July 28th meeting, what the Respondent would do if any strikers returned to work after Monday, August 2, 1954, President Giustina replied, I find, that the firm would not dismiss any replacements, hired prior to their return, in order to put them back to work. However "correct" such a policy announcement might have been, as applied to economic strikers under the Kansas Milling decision, it clearly possessed coercive impact in a context of interference, restraint, and coercion, and the Respondent's attempt to bypass the designated representatives of its employees with respect to wage determination.)

Nothing in the Respondent's course of conduct after the dispatch of its August 5th letter can be described as inconsistent with the view that, under its terms, strikers who failed to report by the indicated date would lose their protected employment status and employee rights. As to such employees, it was clearly intended as a final termination notice, and the Respondent's subsequent course of

conduct, to be noted, reinforces the conclusion that it was so treated.

On August 31, 1955, when the Governors' Proposal was presented as a formula on the basis of which the strike might be settled, Hughes refused, categorically, to negotiate with the Union representatives. As noted, the firm's position was grounded in a contention that the Union's status as the exclusive representative of its employees had been "questioned" by certain employees privy to a decertification petition, previously filed. This contention must be rejected as specious. Ostensibly, if its labor relations director may be credited, the Respondent's refusal to negotiate with the Union was bottomed upon the assumed applicability of the Board's Midwest Piping doctrine. That doctrine, as enunciated in *Midwest Piping Supply Company, Inc.*, 63 NLRB 1060, and developed in later cases, established a general prohibition against the execution of trade agreements by employers with one of two or more rival unions engaged in the presentation of conflicting representation claims involving employees, during the pendency of representation proceedings before this agency.

(In the light of the doctrine, so-called, the execution of a trade agreement under the circumstances indicated would be considered interference with the Board's functions in regard to the resolution of the representation question, and a breach of the employer's obligation to remain neutral. See also *William Penn Broadcasting Company*, 93 NLRB 1104; *Ensher, Alexander and Barsoom, Inc.*, 74 NLRB

1443; Henry E. Spiewak, et al., d/b/a I. Spiewak and Sons, 71 NLRB 770; and related cases.)

By virtue of its reliance upon this doctrine, however, in a situation involving a decertification petition, the Respondent must, necessarily, be charged with knowledge, also, as to the limitations of the decisional principle involved. These limitations, indeed, would be operative as a matter of law, irrespective of the Respondent's knowledge, in the determination of any question raised as to the propriety of its conduct. Specifically, I find, the limitation established by this agency in the Penn Broadcasting case would be applicable here. In that case it was pointed out that:

* * * a broad application of the doctrine * * * would serve only to deprive employees of the benefits of an uninterrupted bargaining relationship whenever a clearly unsupportable or specious rival claim is made upon an employer * * * we conclude that the pendency of a petition for certification imposes no duty upon an employer to refrain from continuing exclusively to recognize and deal with an incumbent bargaining representative, such as we have here, unless the petition has a character and timeliness which create a real question concerning representation.

Did the petition, in this case, possess the requisite "character and timeliness" indicated? I find myself led to the conclusion that it did not.

One of the essential elements involved in any de-

termination with respect to the existence of a question of representation is a finding in regard to the existence or nonexistence of a so-called "contract bar" in the case. The Respondent, therefore, while predicated its refusal to negotiate with the Union in regard to a strike settlement on the pendency of the decertification petition, must be charged with knowledge of this agency's established rule in regard to the application of "contract bar" principles in decertification cases. In the Thirteenth Annual Report of the Board, at page 29, its policy in this respect was set forth as follows:

In Matter of Snow & Nealley (76 NLRB 390), the Board enunciated the policy of applying the usual contract bar principles and other rules of decision involved in prior years, to decertification proceedings. Consequently, whether in certification or decertification proceedings, the Board's general rule continued to be that a valid written collective bargaining agreement, signed by the parties and effective before the petitioner raised a question of representation, extending for a definite and reasonable period, and embodying substantive terms and conditions of employment, constitutes a bar to a petition for an election among the employees covered by such contract until shortly before its terminal date. This rule has equal applicability to newly executed agreements and to those which take effect pursuant to automatic renewal clauses.

The Respondent contended, at the August 31st conference, that a question with respect to representation had been raised by the decertification petition. Yet, at the same time, it was entirely aware of the fact that its contract with the Union had been renewed automatically earlier in the year, for a term of reasonable duration—and that it was, therefore, in full force and effect when the decertification petition was filed. The petition on its face, indeed, acknowledged the existence of the contract as a current commitment of the firm. And the Respondent had been served with a copy. Under the circumstances, it was obligated to determine, at its peril, whether the petition had a “character and timeliness” sufficient to create a real question with respect to representation. In the achievement of a determination with respect to this aspect of the situation, on the basis of statutes currently effective and authoritative legal opinions, the Respondent was not helpless; its labor relations director, a member of the bar, clearly possesses—and did possess, at all material times—the fund of knowledge in this specialized field necessary to reach the required conclusion. And even if it could be assumed, for the sake of argument, that he gave no consideration, in fact, to the status of its current agreement with the Union as a bar to the decertification petition, such an omission on the Respondent’s part would confer no absolution. The obligation would still rest with this agency, under prescribed statutory precedures, ultimately to determine, after full litigation, whether a real question with respect to

representation had existed. And under applicable decisional doctrine, as noted, none may be found. It follows, therefore, and I find, that the Respondent's refusal to negotiate with the Union in regard to a strike settlement rested upon inadequate grounds, and involved an unfair labor practice.

(It may be worthy of note, in passing, that the Respondent's labor relations director cited no reason other than the pendency of the decertification petition, as a justification or explanation for its rejection of the Union's overture in regard to a possible strike settlement. Indeed, this appears to have been the only reason evolved by the Respondent's management prior to the conference, to justify the position which it took. See the testimony of the firm's production manager. Counsel for the Respondent now argues however, for the first time, that the Union representatives attended the meeting with "closed minds" since they sought to secure the Respondent's unqualified agreement to settle the strike on the basis of the formula which the Fact Finding Panel was expected to evolve; it is contended, that this agency cannot find the Respondent guilty of an improper refusal to bargain, in view of the Union's alleged "refusal" to negotiate in good faith. The short answer to this contention, however, may be found in the Respondent's concession that Howden merely stated the Union's desire to "talk" about the proposal, and that Hughes rejected it, out-of-hand, as inapplicable to the Respondent on the basis of the pendency of the decertification petition. The situation therefore

never reached the point, argued by counsel, at which it could have been determined that the Union's position was, actually, inflexible.)

The Respondent's letter of September 2, 1954, also, ostensibly dispatched as a notice to the Union that its trade agreement with the firm had been terminated, cited no reason for its cancellation. And no reason was thereafter communicated to the Union representatives. In the absence of any proffered explanation, then, it would certainly seem to be inferable, as the General Counsel argues, that the Respondent considered the contract in full force and effect until the letter's dispatch.

(Nothing in the record, indeed, would compel, or even suggest, a contrary conclusion; President Giustina's only reference, previously, to the status of the contract appears to have been that embodied in his inquiry of Business Agent Howden, after the strike began, as to whether the Union considered the agreement to be in force. Howden's reply, indicative of his belief in the continued effectiveness of the contract, was never thereafter challenged.)

As has been pointed out, the Respondent made no effort to justify its action as a notice of termination effect as of the contract's expiration date. The letter was intended to serve as a termination of the agreement instantane. Its Article XIII, however, made no provision for such action by either party. If any colorable ground for the Respondent's action existed at all, it could only have been found

dehors the agreement. No such grounds, however, were cited.

I find it impossible to escape the conclusion that the Respondent terminated its agreement with the Union in a further effort to justify its refusal to negotiate with that organization in regard to a strike settlement. It would, of course, be speculative to conclude that the Respondent's action was motivated by a desire to correct the deficiency in its legal position, previously noted, with respect to the applicability of the Midwest Piping doctrine as a bar to negotiations during the pendency of the decertification petition, though the Respondent's counsel has admitted that the termination notice was sent in the hope that a Board election would follow to resolve all questions as to the Union's status. Whatever the motives of the Respondent may have been, however, there can be no doubt that its letter of September 2, 1954, was reasonably calculated to impair the Union's position as the exclusive representative of the firm's employees, and that it could be expected at the very least to persuade them, whether strikers or strike breakers, that the Union had lost its influence as their bargaining agent. Under all the circumstances, therefore, the dispatch of the letter must also be characterized as a refusal to bargain in good faith with the Union, and as interference, restraint, and coercion directed to the Respondent's employees.

In the light of the available evidence there can be no doubt that each element in the Respondent's course of action as detailed above, and its entire

course of conduct, involved the unfair labor practices found and served, necessarily, to convert the Union's antecedent economic strike into an unfair labor practices strike. Maurice Embroidery Works, Inc., 111 NLRB No. 171, 35 LRRM 1663. Objective evidence as to the effect of the Respondent's course of conduct in this regard, and the consequential prolongation and extension of the strike, may be found in the record. Specifically, it may be noted that the Respondent's employees still on strike after August 5, 1954, voted overwhelmingly—at a regularly called Union meeting—to return to work as a group. In effect, this was a vote to extend or continue the strike, despite the apparent success of the back-to-work movement and the resumption of operations at the Respondent's plant. It should be noted, also, that the Respondent's operation was the only one previously under contract with a constituent local of the District Council at which the so-called "industry-wide" strike remained current after the publication of the Governors' Proposal with respect to a strike settlement.

(The undisputed testimony of District Council Secretary Kraal, which I credit, establishes that 30-32 of the firms under contract with its constituent locals had reached some fixed or interim settlement with respect to the wage issue prior to the June 21st strike deadline. Between that date and August 26, 1954, when the Governors' Proposal was published, about 23-25 firms settled. And about 23-26 firms settled thereafter, on the basis of the proposal. With respect to the Union, in particular,

the record shows that it had had five firms, in addition to the Respondent, under contract prior to the strike deadline; of this group, three had settled on terms acceptable to the Union, I find, before the 21st of June. One had proffered an acceptable settlement proposal on the 22nd; the other accepted the Governors' Proposal, as noted.)

An inference that the Respondent's course of conduct, as herein found, had raised additional issues in its dispute with the Union, and thereby prolonged the strike, would seem to be inescapable.

This conclusion, however, need not be left to inference alone. At the January 8, 1955, conference the Respondent was effectively put on notice that the Union would insist upon some disposition of the new issues created by the firm's course of conduct, as a condition precedent to the resumption of negotiations with respect to the wage issue previously in dispute. In taking this position, the Union representatives made it abundantly clear, I find, that the issues newly raised by the Respondent had become operative factors in the continuation of the dispute and the continued presence of the Union's picket line. Their statements in this connection must be characterized as cogent proof with respect to the causal relationship between the conduct herein characterized as violative of the statute and the prolongation of the strike. Cf. *Harcourt and Company, Inc.*, 98 NLRB 892, 909, in which the necessity of proof sufficient to establish such a relationship has been explicated.

(The Respondent argues the absence of any casual connection between its course of conduct and the prolongation of the strike on the ground that "control" of the controversy had been delegated to the District Council and the Northwest Council of Lumber and Sawmill Workers, and that these organizations had decreed the strike's continuation until the Respondent's acceptance of the "Governor's formula" as a settlement basis. The contention must be rejected. Most strikes, economic in origin, which are converted into unfair labor practice strikes acquire their character as such, in law, despite the persistence of the original dispute which led to the strike—and often as a result of the failure of the parties to resolve their economic differences. The pendency of unresolved economic issues, therefore, may not be considered sufficient, in and of itself, to prevent the conversion of any work stoppage into an unfair labor practice strike, if the evidence establishes the employer's participation in conduct, violative of the statute, which has, in fact, prolonged the dispute.)

Under established decisional doctrine, it may be taken as datum that an employer may not discharge employees for engaging in legal non-tortious, strike activity or other protected concerted action. *Colonial Fashions, Inc.*, 110 NLRB 1197, 1203; *Cowles Publishing Company*, 106 NLRB 801, affirmed 214 F. 2d 708; *Price Valley Lumber Company*, 106 NLRB 26, affirmed 216 F. 2d 212. It may also be taken as an elementary principle of applicable law that an employer is obligated to bargain with the statutory

representative of its employees, even during the course of a strike, so long as the statutory agent's status, as such, has not been terminated or otherwise, in good faith, cast in doubt. *N. L. R. B. v. Highland Shoe, Inc.*, 119 F. 2d 218, enf'g 23 NLRB 259. Neither justification for the Respondent's refusal to negotiate, in this case, has been established by the available evidence. Upon the entire record, therefore, I find that the Respondent's course of conduct between July 28, 1954, and September 2, 1954, previously detailed, whether considered in its totality, or as a series of severable incidents—involved a refusal to bargain in good faith with the Union, as the statutory representative of its employees in an appropriate unit, and interfered with, restrained, and coerced these employees in the exercise of rights statutorily guaranteed. And in accordance with the General Counsel's contention, it is further found that the firm's course of conduct converted the strike then current into an unfair labor practice strike, and that it served to extend and prolong the dispute beyond the time within which it might conceivably have been settled if confined to the wage issue only.

In the course of the present litigation, the Respondent argued, for the first time, that the strike action sponsored by the Union involved a breach of their trade agreement, and that its notices of termination with respect to the agreement were dispatched "following" the breach. Upon the entire record, however, I could not find this contention an

effective defense. At the outset, it may be noted that the Respondent never advanced the contention while the Union's strike action and its picket line were being maintained. Secondly, I find it worthy of note that the Respondent's answer contains no allegation that its action in terminating the agreement was justified by any material breach of the agreement's terms by the Union; the Respondent merely alleges that its notice of termination was dispatched, and subsequently reiterated, after the alleged breach had occurred.

(In his brief, counsel for the Respondent has, indeed, sought to justify the firm's contract termination notices on the ground that the Respondent "thought" at the time that the Union's strike action had breached its agreement. Reference is also made to the fact that the Respondent's plant was then in "normal" operation; it is argued that the willingness of its employees to disregard the Union's picket line, viewed in the light of their action with respect to the decertification petition, constituted an "emphatic disavowal" of the organization's representative status. I find the arguments unpersuasive as justification for the Respondent's action.

It is true that Natale Giustina, as a witness, had testified that the firm's original termination notices were sent, after full discussion, because of the fact that the back-to-work movement and the decertification petition had created a "jumbled mess" with respect to the Union's representative status, and be-

cause of the Respondent's desire to "clear the air" in that respect. There is no evidence, however, that these subjective considerations were cited at the time. On the 31st of August, in fact, Hughes had advised the Union representatives that the Respondent would be willing to bargain in the absence of the representation issue raised by the decertification petition.

President Giustina also testified that the Respondent's management had "given consideration" to the fact that the Union had breached its agreement by the strike action. This testimony was given, however, by means of an affirmative reply to a leading question; when questioned thereafter, in general terms, as to the other factors considered by the Respondent prior to the termination notice, Giustina testified that the management had considered, "The fact that the local gave consideration that we had broken the contract." In so testifying, the Respondent's president obviously misspoke himself. And the fact that he did so, immediately after hearing a leading question on the subject, may be taken, at the very least, as an indication that the concept of a contract breach was new to him; I find that it represents an afterthought, and that it played no part in the firm's decision to send the September 2d letter.)

Even if it could be assumed however, for the sake of argument, that the Respondent's plea, and its course of conduct, properly raise an issue as to the Union's alleged breach of a contractual commit-

ment, a determination adverse to the firm would appear to be required on the merits.

Under Article II of the agreement, the parties established certain procedures calculated to promote the analysis and adjustment of "all complaints arising out of the collective bargaining relationship" between them, and went on to establish a procedure to be utilized for the adjustment of "employee grievances" as contractually defined. Article IX dealt with strikes and lockouts. It declared specifically that the grievance procedures established under Article II would be considered "adequate" to provide a "fair and final determination" with respect to all "grievances" arising under the agreement's terms. I note, however, that the language of the agreement with respect to strikes and lockouts did not interdict such action during the contractual term, but merely provided that no such action should be undertaken or sanctioned until every "peaceable method of settlement" provided under Article II of the agreement had been tried without success. The contract went on to specify certain steps to be taken prior to any strike or lockout action, but provided only three sanctions in the event of any failures or omissions in that connection; the Union obligated itself to "endeavor" to secure the return of any strikers in order to facilitate the peaceful settlement of the dispute in accordance with contractually established procedures, the Respondent reserved its right to discipline any employees involved in strike action violative of the

agreement, and the parties agreed that no grievance should be discussed or processed for the duration of any violation.

In a separate and severable provision, the agreement provided that wages would “continue” subject to the right of either party to request a general change, at any time, by appropriate written notice.

The record reveals some argument as to whether Article IX of the agreement was intended to establish procedures applicable in cases of impasse with respect to wage negotiations, or was, in fact, limited in its applicability to instances involving other unresolved grievances, of a collective or individual character. Neither contention was established beyond doubt. They were not, however, extensively litigated. If they had been, I would now be constrained, upon the entire record, to find that the Respondent, chargeable with the burden of establishing its own affirmative defenses, had not succeeded with respect to this issue.

(There is some testimony by President Giustina, for example, that the contractual revisions negotiated in 1953, with respect to the strike and lockout clause had been specifically motivated, from the Respondent’s point of view, by a desire to eliminate the possibility of “quickie” strikes over grievances.)

I would find it by no means clear, in short, that the Respondent was privileged to treat a strike incidental to general wage negotiations as a material breach of the agreement’s strike and lockout clause.

The Respondent's contention, therefore, that the strike call involved a breach of the agreement, and its implied contention that such a breach permitted it to elect the agreement's termination, must be rejected.

(The Respondent's answer also contains a contention, by way of affirmative defense, that the Union's strike action constituted an unfair labor practice—within the meaning of the statute—apart from its character as a contractual breach; the firm argues, apparently, that the Union ought to be held responsible for a refusal to bargain in good faith because it resorted to strike action prior to the expiration date of the agreement with respect to which it desired to negotiate modifications. See Section 8 (d) (4) of the Act, as amended. It is contended that the strike, therefore, relieved the Respondent of any obligation to deal with the organization. I would find the argument without merit. *Lion Oil Company*, 109 NLRB 680, 681-686, 34 LRRM 1410, set aside 221 F. 2d 231 (C. A. 8), pet. for cert. filed July 15, 1955. In addition, it should be noted that the Respondent, prior to the instant case, never sought to justify its refusal to deal with the Union, or its attempt to terminate their agreement, on these grounds; it continued to deal with the Union and its designated representatives after the strike began, directly and through the Willamette Valley Lumber Operators Association committee, without even raising a question as to the Union's alleged statutory violation. The Respondent disclaims any intention to "push"

the point, however—and I find it unnecessary, therefore, to analyze the contention in detail.)

As a part of its case the Respondent offered the transcript, previously noted, of its January 8th conference with the Union representatives in regard to its proposal for the effectuation of a wage increase at the Eugene plant comparable to that recommended by the Fact Finding Panel. Implicit in the Respondent's presentation is a contention that it displayed its willingness to negotiate with the Union at this conference, in regard to wage rates, and that the Union representatives were the ones who refused to discuss the issue. Any such contention must likewise be rejected. The Respondent, it is true, did express its desire to negotiate with respect to a wage increase or at least to solicit the Union's "approval" of a wage increase in conformity with the industry-wide pattern established by the Fact Finding Panel, in its final report. The Union, however, did nothing more than insist that the Respondent's course of conduct since June 21, 1954, had complicated the strike situation and created new issues, which would have to be settled first. In substance, therefore, the parties were unable, at the outset to agree upon the subjects to be discussed or negotiated. I cannot however, in the light of the record, accept the contention that the Union's position was so unreasonable as to evince a rejection of the collective bargaining principle.

(The Respondent's counsel argues, also, that the Union did not request the Respondent to bargain on

the 8th of January, with respect to the issues as it saw them. This may very well have been true—although it is clear that the Union representatives indicated their willingness to discuss the issues, then, or at any time. In the light of the available evidence, however, there would seem to be no need to consider the implications, if any, of the Union's alleged failure to request negotiations. I find it sufficient to note that the Union representatives made no effort to prevent discussion with respect to the matters then in dispute.)

And in any event, it would seem to be clear that the Respondent's effort to secure the Union's approval for its effectuation of the long disputed wage increase, could not—under the circumstances herein found—counteract the effect of its antecedent unfair labor practices. *McCarthy-Bernhardt Buick, Inc.*, 100 NLRB 1475, 1479-1480; *Augusta Broadcasting Company*, 58 NLRB 1493, 1505.) And I so find. Any contention to the contrary, implicit in the Respondent's presentation, must be rejected as deficient in merit.

The Respondent, finally, argues that it was under no obligation to bargain with the Union, since that organization's authority to negotiate with respect to wages had been "permanently transferred" to the District Council; the Union, it is contended, thereby rendered itself incapable of bargaining, in good faith, with respect to general wage issues. The argument lacks merit. Despite the Respondent's attempt

to characterize the Union's action as a "surrender" of its responsibilities with respect to the representation of the firm's employees, there can be no doubt that the authority to negotiate which it delegated to the Council was, in a very real sense, limited. Its own representative, Howden, functioned as an active participant in the work of the Council's committee. That committee made no effort to negotiate or execute complete agreements; nor does it appear that Council representatives participated, as such, in the day-to-day administration of any contracts executed by the Union, or any of its sister locals, except upon invitation, and then only to assist the local involved. The Council, as such, does not appear to have initialed or executed wage agreements; when reached, such agreements were apparently embodied in definitive contracts negotiated and signed by its constituent locals. And in the light of the available evidence with respect to the Respondent's contract history, in particular, I cannot accept the argument that the Union's action involved an "abdication" of its statutory responsibilities as a bargaining agent.

The District Council has advanced no claim to status as the designated representative of any employees. And the Respondent has not been charged with any refusal to bargain vis-a-vis the Council or its representatives.

(The absence of any statutory obligation to bargain with the Council, therefore, under Section 9 (a) of the Act, as amended, must be considered immaterial. Cf. *Standard Oil Company*, 92 NLRB 227,

236. And the Respondent's reliance upon the cited case may be rejected as misplaced.)

In the final analysis, the Council appears to have functioned only as the representative of its constituent locals, in the presentation of coordinated wage demands. And, despite the Respondent's contrary contention, I so find. It follows, and I further find, that the Union did not—by its delegation of authority in connection with the negotiation of wage issues—withdraw from collective bargaining with the Respondent, or prevent negotiation in good faith for the purpose of reaching an agreement.

(The Respondent even charges that the Union's conduct, in this connection, involved an independent refusal to bargain and constituted a union unfair labor practice causally connected with the strike. In the absence of evidence, however, tending to establish that the designation of the District Council as the representative of its constituent locals, in the 1954 negotiations, was reasonably calculated to forestall or prevent agreement on the wage issue, the contention must be rejected.)

The obligation of an employer to reinstate unfair labor practice strikers upon their unconditional application for such re-employment, and to dismiss, if necessary, any employees hired to replace them on or after the date on which their action was converted into an unfair labor practice strike, is well established. *N. L. R. B. v. Mackay Radio & Telegraph Company*, 304 U. S. 333, 345; *Pecher Lo-*

zenge Co., Inc., 98 NLRB 496, 499, and subsequent cases. The responsibility of the employer affected, in such cases, may not be considered dependent upon proof that specific strikers have not been replaced, or that their former or substantially equivalent employment is, in fact, available for them. East Texas Steel Castings Company, Inc., 108 NLRB 1078, 1081; Pecheur Lozenge Co., Inc., 98 NLRB 496, 498. Nor may it be treated as dispelled or waived by virtue of the fact that certain designated strikers may have applied for reinstatement, by name, after the Union's dispatch of a mass application in behalf of all of the employees involved.

It may very well be true, as the Respondent herein sought to prove, that a smaller crew has been required to maintain its Eugene operation since work resumed.

(Extensive testimony was offered in this connection, calculated to establish that the strike had seriously impaired the Respondent's ability to implement certain of its plans with respect to the maintenance and improvement of its log supply—and that the Respondent, therefore, has never been able to resume the second shift operation interrupted by the work stoppage.)

This fact, however, if it be a fact, would affect the nature and scope of my recommendations, and this agency's order, if any; it would not affect the propriety of a legal conclusion with respect to the existence of the statutory violation and the necessity for appropriate remedial action.

(Essentially, the problem seems to have developed since the concerted activity of the Respondent's employees, itself, created a business problem, which—from the standpoint of the firm—made the abandonment of the second shift necessary or desirable. In such a situation the Respondent's action, though motivated—insofar as the record shows—by business necessity, would necessarily impair the exercise, by its employees, of legitimate rights. It would seem to be essential, to effect a balance which would “work out an adjustment” between the rights involved. Cf. *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 797. Such a balance may appropriately be worked out in connection with the formulation of a remedy for the unfair labor practices found.)

In this connection, also, the Respondent sought to adduce evidence specifically designed to show that designated strikers had not, in fact, been subjected to discriminatory treatment. With respect to 40 individuals, an exhibit was offered to establish the “termination” of their employment prior to the strike, or prior to the Union's request for their reinstatement; this group, allegedly, included men who had resigned or reported their lack of interest in reinstatement prior to January 19, 1955, men terminated at various times for physical disability, and men discharged after their return as strike-breakers because of their “failure” to report for work thereafter. The Respondent also listed 14 men, alleged to be discriminatees, who had returned to work after July 28, 1954; of this number, seven were shown to

have been subsequently terminated however, allegedly for a "failure" to report for work. The Respondent claimed to have no information as to whether any of those terminated for their failure to report had, in fact, rejoined the strikers. See the *Pecheur Lozenge* case, previously cited, at footnote 7, for a discussion of the reinstatement and back pay rights of any employees so situated.

(The Respondent listed 29 workers, in a third exhibit, for whom work allegedly would not have been available after August 8, 1955, because of the second shift's discontinuance; these employees were described as men newly hired for the second shift between April 25, 1954, and the 21st of June, or first shift workers hired after the earlier date who would have been "bumped" upon the termination of the second shift by reassigned second shift workers with seniority.)

Each of these exhibits involved a tabulation based upon the Respondent's record; they reflect certain assumptions, employed in their preparation, which the parties were not prepared to litigate expeditiously. Obviously, they could not have been accepted at face value, in the light of the General Counsel's objection, to establish the identity of any strikers not entitled to reinstatement. The exhibits were, therefore, rejected—and, at this time, that ruling is reaffirmed. To the extent that they may adumbrate defenses available to the Respondent, with respect to the firm's liability to individual strikers,

they may be offered for consideration in the formulation of a compliance program.

In accordance with the General Counsel's contention, I find that the refusal of the Respondent, on and after January 19, 1955, to reinstate any of the Union's strikers, constituted discrimination with respect to their hire and employment tenure, to discourage Union membership and concerted activity for mutual aid and protection, and that it was reasonably calculated to interfere with, restrain, and coerce the firm's employees in their exercise of rights statutorily guaranteed.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, set forth in Section III above, which occurred in connection with its operations as described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead, and in this instance have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Since it has been found that the Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act, as amended.

Specifically, since it has been found that the Re-

spondent engaged in certain acts of interference, restraint, and coercion, it will be recommended that it cease and desist from such conduct.

It has also been found, among other things, that the Respondent refused to bargain collectively with the Union, on and after July 28, 1954, and that its refusal has continued. It will therefore be recommended that the Respondent, upon request, bargain with that organization as the exclusive representative of its employees in the unit found herein to be appropriate for the purposes of a collective bargain, and, if an agreement is reached, reduce it to written form and sign it.

Since it has been found that the Respondent's refusal to re-employ any Union strikers on or after January 19, 1955, the date of their unconditional application for reinstatement, was discriminatory and violative of the statute, I shall recommend that the Respondent, if it has not already done so, offer the employees listed elsewhere in this report, who were on strike as of January 19, 1955, full reinstatement to their former or substantially equivalent positions, dismissing, if necessary, any employees hired since July 28, 1954, to replace them.

(This recommendation will apply, of course, to any employees who may have accepted re-employment for a few days, on or after July 29, 1954, and thereafter rejoined the strikers. If still on strike as of January 19, 1955, they would have been entitled to reinstatement on that date to the same extent as

other strikers, and to compensation for any loss of pay suffered by them as a result of the discriminatory refusal of reinstatement herein found.)

If, after the dismissal of any replacement employees, there are not enough positions available for all of the workers entitled to reinstatement, available positions should be distributed among them, without discrimination because of their Union membership, activity, or participation in the strike, on the basis of a seniority system, or any other nondiscriminatory practice with respect to work assignments previously followed by the Respondent in the conduct of its business. The employees for whom no work may be immediately available, after such distribution, should be placed upon a preferential hiring list, with priorities determined on the basis of a seniority system, or any other nondiscriminatory system previously followed by the Respondent in the conduct of its business; they should be offered reinstatement thereafter, in accordance with such a list, as positions become available and before other persons are hired for the work. *Pecheur Lozenge Co., Inc.*, *supra*, pp. 499-500. Reinstatement, as recommended in this report, should be effectuated without prejudice to the seniority of the employees or any of their other rights and privileges.

It will also be recommended that the Respondent reimburse all of the employees entitled to reinstatement for any loss of pay they may have suffered by reason of the Respondent's discrimination with respect to them, by the payment to each of a

sum of money equal to the amount which he normally would have earned as wages during the period from January 19, 1955, the date of the Respondent's refusal to reinstate the employees, as a group, upon their unconditional application, to the date of the Respondent's offer to reinstate the employees or place them on a preferential hiring list in the manner described above, less his net earnings during that period. Cf. *Crossett Lumber Company*, 8 NLRB 497, 498; *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7, ff. Such pay losses should be computed on the basis of separate calendar quarters, in accordance with the formula which the Board now utilizes. *F. W. Woolworth Company*, 90 NLRB 289; *N. L. R. B. v. Seven-Up Bottling Company of Miami, Inc.*, 344 U. S. 344, ff.

(Should a Board order in this case be necessary, in the event of any failure on the Respondent's part to comply with these recommendations, it will be recommended that the Board expressly reserve the right to modify the reinstatement and back-pay provisions of its order if such action should become necessary by reason of a change of conditions not appearing in the record, and to make such supplements to its order as may become necessary in order to define or clarify their application to a particular set of circumstances not now apparent. *Differential Steel Car Company*, 75 NLRB 714, 732; *Toledo Desk and Fixture Company*, 65 NLRB 1086, 1109-1111; and a host of similar cases.)

Since a discriminatory refusal to reinstate other-

wise qualified workers upon their unconditional application after an unfair labor practice strike “goes to the very heart of the Act” and the rights therein guaranteed (N. L. R. B. v. Entwistle Manufacturing Company, 120 F. 2d 532, 536) I am constrained to find that the unfair labor practices attributable to the Respondent disclose an attitude of opposition to the statute’s purposes with respect to the protection of employee rights in general; they are closely related to the other unfair labor practices proscribed by the Act, as amended, and a danger with respect to the commission of such unfair labor practices in the future is to be anticipated from the conduct of the Respondent in the past. The preventive purposes of the statute would be thwarted, then, unless the remedial action in this case, and any necessary order, can be made co-extensive with the threat. In order, therefore, to make the interdependent guarantees of Section 7 more effective, to prevent any recurrence of the unfair labor practices, to minimize industrial strife which burdens and obstructs commerce, and thus to effectuate the policies of the statute, it will be recommended that the Respondent cease and desist from infringement in any other manner upon the rights guaranteed in Section 7 of the Act, as amended.

Finally, in order to secure expeditious compliance with the recommendations made herein with respect to back pay and reinstatement, it will be recommended that the Respondent preserve and, upon request, make available to the Board and its agents, all pertinent payroll and other records.

Conclusions of Law

In the light of the foregoing findings of fact, and upon the entire record in the case, I make the following conclusions of law:

1. The Respondent is an employer within the meaning of Section 2 (2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2 (6) and (7) of the Act, as amended.

2. Local 2611, Lumber and Sawmill Workers, AFL, is a labor organization within the meaning of Section 2 (5) of the Act, as amended.

3. All of the employees at the Respondent's sawmill and planing operations in Eugene, Oregon, and the log dump and pond located at Springfield, Oregon, exclusive of office and professional employees, guards, and supervisors, as defined in Section 2 (11) of the Act, constitute a unit appropriate for the purposes of a collective bargain within the meaning of Section 9 (b) of the Act, as amended.

4. Local 2611, Lumber and Sawmill Workers, AFL, was on June 21, 1954, and at all times thereafter has been, entitled to act as the exclusive representative of the employees in the unit described above for the purposes of a collective bargain, within the meaning of Section 9 (a) of the Act, as amended.

5. By its refusal to bargain collectively with the Union as the exclusive representative of its employees in a unit appropriate for the purposes of a col-

lective bargain, on and after July 28, 1954, the Respondent engaged and has continued to engage in unfair labor practices within the meaning of Section 8 (a) (5) of the Act, as amended.

6. By its interference with, restraint, and coercion of employees in their exercise of rights guaranteed under Section 7 of the Act, the Respondent engaged and has continued to engage in unfair labor practices within the meaning of Section 8 (a) (1) of the Act, as amended.

7. By its unfair labor practices as herein found, the Respondent converted the Union's economic strike action of June 21, 1954, into an unfair labor practice strike, and prolonged the strike.

8. By its refusal to reinstate unfair labor practice strikers upon the Union's unconditional request for their reinstatement, on and after January 19, 1955, the Respondent discriminated in regard to their hire and employment tenure to discourage membership in Local 2611, Lumber and Sawmill Workers, AFL; the Respondent thereby engaged and has continued to engage in unfair labor practices within the meaning of Section 8 (a) (3) of the Act, as amended.

9. The unfair labor practices found are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act, as amended.

Recommendations

Upon these findings of fact and conclusions of

law, and upon the entire record in the case, I recommend that the Respondent, Giustina Bros. Lumber Co., and its officers, agents, successors, and assigns, should:

1. Cease and desist from:

(a) Interference with, restraint, or coercion of its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist Local 2611, Lumber and Sawmill Workers, AFL, or any other labor organization, to bargain collectively through representatives of their own free choice, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act, as amended;

(b) Refusal to bargain collectively with Local 2611, Lumber and Sawmill Workers, AFL, as the exclusive representative of all of the employees at its sawmill and planing operations in Eugene, Oregon, and the log dump and pond located at Springfield, Oregon, exclusive of office and professional employees, guards, and supervisors, as defined in Section 2 (11) of the Act, with respect to labor disputes, grievances, rates of pay, hours of employment, and other terms and conditions of employment;

(c) Discouragement of membership in the above-

named labor organization, or any other, by a refusal to reinstate any of its employees engaged in concerted activity as unfair labor practice strikers, because of their union membership or activity, or by discrimination in any other manner with respect to their hire or employment tenure, or any term or condition of their employment.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 2611, Lumber and Sawmill Workers, AFL, as the exclusive representative of all the employees in the above-described unit, with respect to labor disputes, grievances, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer to employees who were on strike as of January 19, 1955, insofar as it may not already have done so, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, or place them on a preferential hiring list, in the manner set forth in the "Remedy" section of this report, and make them whole for any loss of pay or other incidents of the employment relationship which they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the aforesaid "Remedy" section, dismissing, if necessary, any persons hired on or after July 29, 1954, who were not in the Respondent's employ on that date;

(c) Preserve and make available to the National Labor Relations Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for an analysis of the amounts of back pay due and the reinstatement rights of employees in accordance with these recommendations;

(d) Post at its places of business in Eugene and Springfield, Oregon, copies of the notice attached to this report as an Appendix. Copies of the notice, to be furnished by the Regional Director of the Nineteenth Region, as the agent of the Board, should be posted immediately upon their receipt, after being duly signed by a representative of the Respondent. When posted, they should remain posted for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps should be taken by the Respondent to insure that these notices are not altered, defaced, or covered by any other material;

(e) File with the Regional Director of the Nineteenth Region, as the agent of the Board, within twenty (20) days of the date of service of this Intermediate Report and Recommended Order a statement in writing setting forth the manner and form in which it has complied with these recommendations.

Recommended Order

If, within twenty (20) days after the date of service of this Intermediate Report and Recom-

mended Order, the Respondent satisfies the Regional Director, as the agent of the Board, that it has complied, or will comply with the recommendations herein made, it is recommended that the National Labor Relations Board issue an order or take other appropriate action to close the case on compliance. Unless the Respondent satisfies the Regional Director, within twenty (20) days after the date of service of this Intermediate Report and Recommended Order that it has complied or will comply with the foregoing recommendations, it is recommended that the National Labor Relations Board issue an order requiring it to take such action.

Dated this day of September, 1955.

MAURICE M. MILLER,
Trial Examiner.

APPENDIX

Employees Entitled to Reinstatement

Bearden; Bellmore, John; Blanton, Gene; Bloom Orville; Bogart, Charles; Bowers, G. P.; Bratton, Leroy; Breckwig, R. L.; Brock, Wallace; Brooks; Brown, Billy; Brown, E.; Bruce, Denver; Bryant, Melvin; Buel, Roy; Butenscheon, Frank; Brock.

Carlson, John; Carpenter, W. G.; Casper, George; Casteel, Iley; Caudle, Loyal; Clark, Glenn; Cook, Ray; Cornwall, Arthur; Cox, Floyd.

Dietz, Frank; Dilbeck, Ray; Driggs, Otis.

Eaton, Charles; Edmon, David; Elliott, Frank; Erickson, Eylar; Evoniuk, Joe.

Fitzpatrick; Franks, De.

Gandy, Jack; Gentry; Goldenberg; Gray; Greenhoo, Edgar; Gregg, Albert; Gregg, Dale; Gregg, Ross; Gregg, Vernon; Gutbrod.

Hagg, Martin; Halpain; Harmon, Elmo; Hassett, Ed; Hedegaard, John; Hempel, Bernard; Hendricks, H. T.; Hicks, W. R.; Hodge, O. D.; Hopson, William; Huber; Huffman, Leroy.

Jackson, Alvin; Jones, Arthur.

Keopka, Lawrence Kynard, Earl.

LaCross, A. J.; Lambert; Lawson, Delbert; Lawson, John; Lebow, Samuel; Lemmer, Charles; Lloyd; Long, Bommer.

Markell, Roy; McNair, William; Malpass, John; Matthews, Robert; Mayo, Walter; Meade, Clair; Meadows, H. M.; Meskimen, Vaughn; Mikkelsen, Merlyn; Miller, Virgil; Molinda, Fred; Moore, J.; Mullin, P.; Mortenson, Stanley.

Nash, Earl; Noble, Roy L.; Noble, Roy; Nichols, Fred.

Olsen, Harold.

Palmer, William; Pappel, Henry; Parent, Richard; Paris, J. H.; Parker, Paul; Peterson, P.; Phillippe, John; Pickett, John; Pike, Leonard; Potter, Maurice; Price, Clarence.

Rasmussen, Glen; Reinking, Richard; Reed; Rice, Verlin; Richards, James; Roupe, Donald.

Scarlett, Robert; Sceevins, Thurman; Scheid; Sederlin, Harold; Smith, Anthony; Smith, Lewis; Snyder; Sparks, Dean; Strehlow, Date.

Tribe.

Van Dusen, Verl V.; Vladik.

Walker, O. D.; Warren, Al; Watts, Darwin;
Watts, Eugene; Williams, James; Williams, Joe;
Windham, Charles; Wright, Louis.

Yates, Joe; Yancy, Harold; Yoder, Richard.

Zarzan, Alex; Zietner, Ed; Zymbach, Johnny.

APPENDIX

Notice to All Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not refuse, upon request, to bargain collectively with Local 2611, Lumber and Sawmill Workers, AFL, as the exclusive representative of the employees at our sawmill and planing operations in Eugene, Oregon, and the log dump and pond located at Springfield, Oregon, exclusive of office and professional employees, guards, and supervisors.

We Will Not discourage membership in the above-named labor organization, or any other, by a refusal to reinstate any of our employees because of their Union membership or activity, or by discrimination against them in any other manner with respect to their hire or employment tenure, or any term or condition of their employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organ-

izations, to join or assist Local 2611, Lumber and Sawmill Workers, AFL, or any other labor organization, to bargain collectively through representatives of their own free choice, or to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

We Will bargain collectively, upon request, with Local 2611, Lumber and Sawmill Workers, AFL, as the exclusive representative of the employees in the bargaining unit described below, with respect to rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a written and signed agreement. The bargaining unit is:

All employees at our sawmill and planing operations in Eugene, Oregon, and the log dump and pond located at Springfield, Oregon, exclusive of office and professional employees, guards, and supervisors.

We Will, to the extent that we have not already done so, offer all of our employees who were on strike on January 19, 1955, immediate and full reinstatement to their former or substantially equivalent positions, displacing—if necessary—any new employees hired after July 28, 1954, to replace them. If, after such displacement, there are not

enough positions for all such employees, the available positions will be distributed among them in accordance with a seniority system or other non-discriminatory arrangement heretofore applied in the conduct of our business. Any of our employees, previously on strike, for whom employment is not immediately available will be placed upon a preferential hiring list, priority on such list being determined by the seniority system or other nondiscriminatory practice heretofore applied in the conduct of our business. Thereafter, such employees will be offered reinstatement in accordance with the list, as positions become available, and before other persons are hired for such work. Such reinstatement will be without prejudice to their seniority and other rights and privileges.

We Will make our employees whole for any loss of pay each of them may have suffered as a result of our discriminatory refusal to rehire any of them on January 19, 1955, after their unconditional offer to return.

All of our employees are free to become or remain, or refrain from becoming or remaining members of Local 2611, Lumber and Sawmill Workers, AFL, or any other labor organization, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment, or any term or condition of employment,

against any employee because of membership in or activity on behalf of any labor organization.

Dated

GIUSTINA BROS. LUMBER CO.,

(Employer)

By

(Representative) (Title)

This notice must remain posted for 60 days from its date, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS OF RESPONDENT TO INTERMEDIATE REPORT & RECOMMENDED ORDER

Giustina Bros. Lumber Co., Respondent herein, takes exceptions to the "Intermediate Report and Recommended Order" in this proceeding as follows:

1. To the failure of the Trial Examiner to state his "Findings of Fact and "Conclusions" separately to enable Respondent to comply with the Rules of the Board requiring specific and precise exceptions to be taken to the "Report and Recommended Order."

2. To the finding that the labor contract between Respondent and Local Union #2611 continued to April 1, 1955 (R.p. 2, Ll. 4-8).

3. To the intimation that the no-strike features of the labor contract applied only to grievances (R.p. 2, L. 55).

4. To the conclusion that the contract provided that Union employees should not be required to act as strike breakers (R.p. 4, Ll. 12-14).

5. To the interpretation of the termination article (R.p. 5, Ll. 15-25).

6. To the interpretation of the contract (R.p. 5, Ll. 32-39).

7. To the finding that the District Council represented Local Union No. 2611 (R.p. 6, Ll. 9-14).

8. To the finding that the District Council was the designated agent of Local Union No. 2611 (R.p. 6, Ll. 42-44).

9. To the finding that negotiations were undertaken with the Council (R.p. 7, Ll. 59-61).

10. To the action of the Examiner in going beyond the record (R.p. 8, Ll. 25-35).

11. To the finding that "Respondent's indirect involvement with the Union * * * constituted a part only, of the larger series of negotiations (R.p. 8, Ll. 31-35).

12. To the finding that the Union did not respond to Respondent's attempt to negotiate wages (R.p. 9, Ll. 7-10).

13. To the finding that Respondent did not act to revoke authority to negotiate, or that such negotiation was necessary (R.p. 9, Ll. 33-35).

14. To the finding that Howden "visited * * * in his capacity as District Council Emissary * * *" (R.p. 9, Ll. 55, 56).

15. To the non-sequitur that Hughes participations as a member of the Negotiating Committee, involved Respondent (R.p. 10, Ll. 3-6).

16. To the finding that Local Union No. 2611, undertook strike action (R.p. 10, L. 10).

17. To the finding that the picketing of Respondent's plant was peaceful (R.p. 10, Ll. 12-15).

18. To the failure of the Examiner to find that a copy of the petition of Union Members to "withdraw" authority was given to Respondent by a representative of the Board (R.pp. 10, 11; Ll. 59-13).

19. To the finding that Robertson telephoned Hughes before the meeting of the employees to advise him of the meeting (R.p. 11, Ll. 37-43).

20. To the finding that Hughes testified that a meeting would be held at the plant (R.p. 11, Ll. 45-48).

21. To the failure of the Examiner to follow the stipulation of the parties (R.p. 11, Ll. 48-54).

22. To the finding that the record does not show where Hughes and the Giustina brothers were (R.p. 12, Ll. 8, 9).

23. To the finding that Respondents were at the shop before the meeting of the employees (R.p. 12, Ll. 6, 9-16).

24. To the finding that Hughes asked if all were present who had been invited (R.p. 12, Ll. 18, 19).

25. To the finding that Hughes stood at the head of the group (R.p. 12, L. 33).

26. To the finding that Johnson invited men to a secret meeting in the shop (R.p. 12, Ll. 39-45).

27. To the finding that Hughes asked individuals if they had been invited to the meeting (R.p. 12, Ll. 47, 48).

28. To the finding that Hughes denied that it would be a good thing if Howden were present (R.p. 13, Ll. 1-5).

29. To the finding that Hughes began his remarks as quoted (R.p. 13, Ll. 23, 24).

30. To the finding that no employee left the meeting (R.p. 13, Ll. 37-38).

31. To the finding that Hughes gave the invitees "A thorough scrutiny (R.p. 13, Ll. 39, 40).

32. To the failure to find that the information about the Union's strike vote was given to Respondent by Howden, the Business Agent (R.p. 14, Ll. 45-47).

33. To the finding that Giustina proposed that the men be paid according to individual merit (R.p. 15, Ll. 18-20).

34. To the failure to find that Nat Giustina's remarks were statements of existing conditions in the veneer plant and not proposals to the employees (R.p. 15, Ll. 30-37).

35. To the finding that the stipulation of facts was based upon the notes of Sparks (R.p. 16, Ll. 6-8).

36. To the assumption that Respondent had access to the notes of Sparks, an adverse witness, in drawing the stipulation (R.p. 16, Ll. 6-8).

37. To the finding that an effort was made to characterize Johnson's invitees as trouble makers (R.p. 16, Ll. 39-40).

38. To the finding that the men voted to return to work "under the sponsorship of the Union" (R.p. 17, Ll. 41, 42).

39. To the failure to find that Respondent was not a party to the strike settlement procedure, to the intimations that the industry participated in the settlement proceedings (R.p. 18, Ll. 3-42).

40. To the finding that representatives of Local Union presented a proposal to Respondent on August 31, 1954 (R.p. 18, Ll. 44-46).

41. To the suggestion that representatives of WVLOA were present at the meeting of January 8, 1955, in any capacity (R.p. 26, Ll. 16-18).

42. To the failure to find that the Union was not permitted to negotiate at the meeting of January 8, 1955, (R.p. 21, Ll. 37-43).

43. To the finding that there was discussion of any matter at the meeting of January 8, 1955 (R.p. 21, Ll. 45-55).

44. To the finding that any Union representative was willing to discuss anything at the meeting of January 4, (R.p. 23, Ll. 5-23).

45. To the failure to find that Local #2611 refused to represent all employees without discrimination on account of lack of Union membership (R.p. 23, Ll. 55-58).

46. To the finding that there was an unconditional request for employment (R.p. 24, Ll. 53-61).

47. To the finding that Respondent committed an unfair labor practice (R.p. 26, Ll. 13-16).

48. To the inference that Respondent knew of the back-to-work movement (R.p. 26, Ll. 22-25).

49. To the action of the Examiner in disregarding the stipulation of the parties (R.p. 26, Ll. 27-29).

50. To the finding that Respondent was responsible for Johnson's invitation, if any, to others to attend a meeting (R.p. 26, Ll. 31-33).

51. To the finding that arrangements had been made for the employee meeting in advance (R.p. 26, Ll. 34-45).

52. To the action of the Examiner in finding in contradiction to the stipulation of the parties (R.p. 26, Ll. 47-61).

53. To the finding that Hughes and Respondent had advance notice of the meeting (R.p. 27, Ll. 1-23).

54. To the conclusions that Respondent participated in the back-to-work movement; that Hughes took command of the meetings; that the meeting was pre-arranged (R.p. 27, L. 25-p. 28-44).

55. To the failure to find that Howden, the Business Agent, deprecated the "strike vote" (R.p. 28, Ll. 52-56).

56. To the finding that Respondent proposed a different wage structure and working conditions (R.p. 28, L. 58-p. 29, L. 2).

57. To the finding that Respondent belittled the District Council and suggested the men should think about their own jobs (R.p. 29, Ll. 10-14).

58. To the finding that Respondent attempted to negotiate with the employees (R.p. 29, Ll. 17-21; 51-56).

59. To the finding that Respondent did more than exercise free speech (R.p. 29, L. 58-p. 30, L. 3).

60. To the finding that Respondent negotiated with employees (R.p. 30, Ll. 5-9), threatened strik-

ers (R.p. 30, Ll. 11-18), to the conclusions as to forfeiture of rights (R.p. 30, Ll. 20-29).

61. To the finding that Respondent opposed the purposes of the statute (R.p. 30, Ll. 44-47).

62. To the conclusion that Respondent's argument that the letter notice was lawful amounted only to a play on words (R.p. 30, 31, Ll. 57-2).

63. To the finding that Respondent's letter constituted a threat and was unlawful (R.p. 31, Ll. 3-9).

64. To the finding that Respondent coerced the strikers and attempted to negotiate individually (R.p. 31, Ll. 11-22).

65. To the finding that Respondent discharged employees (R.p. 31, Ll. 24-30).

66. To the finding that Hughes categorically refused to negotiate with Local 2611 (R.p. 31, Ll. 32-34).

67. To the finding that Respondent's position questioning the bargaining authority of Local 2611 was specious (R.p. 31, Ll. 34-38).

68. To the conclusion that the Midwest Piping ruling does not apply to Respondent (R.p. 31, Ll. 38-62).

69. To the conclusion that the decertification petition was not filed timely (R.p. 32, Ll. 1-17).

70. To the conclusion that there was a contract bar to the decertification petition (R.p. 32, Ll. 19-43).

71. To the finding that Respondent knew that the labor contract was in effect (R.pp. 32-33, Ll. 45 to 8).

72. To the finding that Respondent committed an unfair labor practice by refusing to negotiate (R.p. 33, Ll. 8-10).

73. To the finding that the only reason for Respondent's position was the decertification petition (R.p. 33, Ll. 12-19).

74. To the finding that Local Union 2611 was prepared to negotiate (R.p. 33, Ll. 19-34).

75. To the finding that Respondent considered the labor contract in effect (R.p. 33, Ll. 36-50).

76. To the finding that Respondent gave notice of termination of the contract in bad faith; to bolster its legal position; to undermine Local 2611; and constituted a refusal to bargain (R.pp. 33-34, Ll. 52 to 18).

77. To the conclusion that Respondent committed unfair labor practices and converted the economic strike into an unfair labor practice strike (R.p. 34-35, Ll. 20 to 28).

78. To the conclusion that Respondent was not justified in refusing to negotiate (R.p. 35, Ll. 40-42).

79. To the conclusion that Respondent committed unfair labor practices (R.p. 35, Ll. 42-53).

80. To the finding that a breach of the labor contract was not an effective defense to Respondent (R.pp. 35-36, Ll. 55 to 50).

81. To the finding that the labor agreement did not bar strikes (R.pp. 36-37, Ll. 60-12).

82. To the conclusion that the wage article in the labor contract was severable (R.p. 37, Ll. 14-39).

83. To the conclusion that Respondent sought to justify a refusal to bargain upon the existence of a strike (R.p. 37, Ll. 41-54).

84. To the finding that Respondent dealt with Union through the Willamette Valley Lumber Operators Association after the strike (R.p. 37, Ll. 57-60).

85. To the finding that Respondent did not seriously present the issue of an unlawful strike (R.p. 37, Ll. 60-63).

86. To the finding that Local 2611 did not refuse to bargain at the meeting of January 8 (R.p. 38, Ll. 5-20).

87. To the finding that there were issues other than wages between Respondent and Local 2611 (R.p. 38, Ll. 22-31).

88. To the finding that Local 2611 did not abdicate its responsibility as bargaining agent; that it appointed the District Council as agent (R.pp. 38-39, Ll. 42 to 30).

89. To the finding that a union may seek reinstatement of employees when not authorized so to do (R.p. 39, Ll. 43-46).

90. To the conclusions that Respondent's abandonment of a second shift interfered with the "rights" of strikers (R.p. 39, Ll. 48 to R.p. 40, Ll. 49).

91. To the finding that Respondent discriminated unlawfully against strikers (R.p. 40, Ll. 51-57).

92. To each and every part of "V The Remedy" (R.p. 41, L. 12 to P. 42, L. 53).

93. To each and every part of "Conclusions of Law" (R.p. 42, L. 57 to p. 43, L. 43).

94. To each of the "Recommendations (R.p. 43, L. 45 to p. 44, L. 63).

95. To the "Recommended Order" (R.p. 45, Ll. 1-13).

It has not been considered necessary to take specific exceptions to the Trial Examiner's statements of law and interpretation of decisions of the Board and of the Courts.

Reference has not been made to the Transcript of Testimony and Exhibits as they will be precisely identified on the Brief supporting these Exceptions.

Respectfully submitted,

/s/ RICHARD R. MORRIS,
Attorney for Respondents.

United States of America
Before the National Labor Relations Board

Case No. 36-CA-633

GIUSTINA BROS. LUMBER CO. and LOCAL
2611, LUMBER AND¹ SAWMILL WORK-
ERS, AFL-CIO

DECISION AND ORDER

In September 9, 1955, Trial Examiner Maurice

¹ As the AFL and CIO merged subsequent to the hearing in this case, we are taking notice thereof and amending the name of the Charging Union accordingly.

M. Miller issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief, and the General Counsel filed a brief in support of the Intermediate Report.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions² and recommendations of the Trial Examiner.

As for the position taken by our dissenting colleague we disagree that the strikers should be found to have lost their employee status because of any failure on their part to comply with the provisions of Section 8 (d) of the Act. Insofar as any 8 (d) issue was raised, the Trial Examiner found that it

² As Chairman Leedom agrees with the Trial Examiner that the Respondent unlawfully refused to bargain with the Union by virtue of the participation of its representatives in the employees' July 28, 1954, "back-to-work" meeting, he deems it unnecessary to decide whether the evidence also supports the Trial Examiner's conclusion that the Respondent unlawfully participated in pre-arranging that meeting.

was limited to 8 (d) (4) and concluded that under the Board's decision in *Lion Oil Company*³ there was not merit in the contention. In its exceptions to the Board, the Respondent did not take issue with the Trial Examiner's so limiting the 8 (d) issue nor with his failure to consider that 8 (d) (1), (2), or (3) were involved in the case. Also, the Trial Examiner stated that the Respondent sought to justify its refusal to bargain because the employees were on strike. The Respondent excepted to this statement. Necessarily, the Respondent thereby completely negated any reliance upon Section 8 (d) (4). Consequently, we believe that any 8 (d) issue that may have been raised before the Trial Examiner, was thereafter abandoned by the Respondent and the issue is not now before the Board.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Giustina Bros. Lumber Co., Eugene, Oregon, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Threatening its employees with loss of their employee status for engaging in lawful strike activity;

(b) Refusing to bargain collectively upon request with Local 2611, Lumber and Sawmill Workers, AFL-CIO, as the exclusive bargaining representa-

³109 NLRB 680.

tive of all the employees at its sawmill and planing operations in Eugene, Oregon, and its log dump and pond at Springfield, Oregon, excluding office and professional employees, guards, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, or other conditions of employment;

(c) Discouraging membership in the above-named labor organization, or any other labor organization by refusing to reinstate any of its employees engaged in concerted activity as unfair labor practice strikers, or because of their union membership or activity, or by discriminating in any other manner with respect to their hire or employment tenure, or any term or condition of their employment;

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join the above-named labor organization or any other labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, or to refrain from engaging in any or all of such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 2611, Lumber and Sawmill Workers, AFL-CIO, as the exclusive representative of all the employees in the above-described unit, with respect to grievances, wages, rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer to employees who were on strike as of January 19, 1955, as set forth in an Appendix to the Intermediate Report, insofar as it may not already have done so, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, or place them on a preferential hiring list, and make them whole for any loss of pay or other incidents of the employment relationship which they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy" dismissing, if necessary, any persons hired on or after July 28, 1954, who were not in the Respondent's employ on that date;

(c) Preserve and make available to the National Labor Relations Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for an analysis of the amounts of back pay due and the reinstatement rights of employees in accordance with the terms of this Order;

(d) Post at its places of business in Eugene and Springfield, Oregon, copies of the notice attached hereto as Appendix A.⁴ Copies of said notice, to be furnished by the Regional Director of the Nineteenth Region, as the agent of the Board, shall, after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof and be maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. Aug. 21, 1956.

BOYD LEEDOM, Chairman

IVAR H. PETERSON, Member

STEPHEN S. BEAN, Member

[Seal] National Labor Relations Board.

Philip Ray Rodgers, Member, dissenting:

The facts of this case show, I believe, that the Respondent's employees did not comply with the requirements of Section 8 (d) of the Act before

⁴ If this Order is enforced by a United States Court of Appeals, the notice shall be amended by substituting for words "A Decision And Order" the words "Decree Of The United States Court Of Appeals Enforcing An Order."

engaging in strike action against the Respondent. They consequently lost their status as employees of the Respondent.⁵ Because the decision of my colleagues in this case is predicated upon their view that the strikers retained the status of employees, I am impelled to note my dissenting position.

⁵ In their opinion my colleagues assert that there is no 8 (d) issue before the Board in this case. I do not agree. In its amended answer, the Respondent asserted that the strike of its employees was an unfair labor practice within the meaning of the Act. In its brief to the Trial Examiner, the Respondent asserted that the strike was unlawful because it occurred during the contract term; and, in support of this statement, the Respondent paraphrased the language of Section 8 (d) (4). In my opinion, although the Respondent may not have raised the matter with technical nicety, its answer and brief, construed together, without question raised an 8 (d) (4) issue, and, I think, also raised an 8 (d) issue generally.

Nor do I agree with my colleagues' view that the Respondent subsequently abandoned any 8 (d) issue it had raised before the Trial Examiner. The Respondent specifically excepted "To the finding [of the Trial Examiner] that Respondent did not seriously present the issue of an unlawful strike." It also excepted "To the conclusion [of the Trial Examiner] that Respondent sought to justify a refusal to bargain upon the existence of a strike." And, in its brief to the Board, the Respondent argued that it considered the contract in full force and effect, and cited in support of this statement the court decision in the *Lion Oil* case (*Lion Oil Co. v. NLRB*, 221 F. 2d 231 (C. A.8)), which case squarely involved the construction of Section 8 (d) of the Act. Accordingly, although, again, the Respondent may not have proceeded with technical nicety, I think it is clear that it did not abandon its position as to Section 8 (d) of the Act.

The Union, Local Union No. 2611, Lumber and Sawmill Workers (affiliated with the Willamette Valley District Council of Lumber and Sawmill Workers), and the Respondent were parties to a collective bargaining agreement which became effective on May 8, 1953. Article XIII of the agreement provided:

This agreement terminates on 1 April, 1954, but shall automatically extend from year to year unless either party hereto shall have given written notice to the other party at least seventy-five (75) days preceding April 1 of any year of its intention to modify, revise, adjust, or terminate this agreement, specifying in such notice the provisions that it desires to modify, revise, or adjust, or its desire for termination.

The agreement also contained the following clause (Article VIII):

Wages shall continue subject to the right of either party to request a general wage change by giving the other party written notice of its desire for such general wage change. Negotiations shall commence within fifteen (15) days from the date the notice is received.

During the contract year 1953-1954, neither the Union nor the Respondent gave notice under Article XIII of an intention to modify, revise, adjust or terminate their agreement.

On February 10, 1954, however, the Union wrote to the Respondent as follows:

Please be advised that the Willamette Valley

District Council wishes to notify you that we wish to open negotiations for an increase in wages for all of your employees who are represented by our union.

We will appreciate the opportunity to discuss this matter with you or your representatives at an early date.

Pursuant to this letter, and a subsequent exchange of correspondence relating in part to the authority of the District Council to act on behalf of the Union, the parties engaged in bargaining with respect to the Union's requested wage increase. No agreement was reached.

On June 21, 1954, the Union, in furtherance of its wage demands, called a strike against the Respondent, and the Respondent's employees struck and picketed the Respondent's operations. This strike, clearly economic in origin, continued until January 19, 1955.

As neither the Union nor the Respondent gave notice under Article XIII of their agreement of intent to modify or terminate the agreement, it is clear, and the General Counsel has so conceded, that the agreement was automatically extended on April 1, 1954, for another year ending on April 1, 1955. It is also clear that the question of whether the Union satisfied the requirements of Section 8 (d) of the Act⁶ turns on the legal effect of the

⁶ Section 8 (d) of the Act provides in pertinent part: For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of

Union's letter of February 10, 1954, to the Respondent.

It would appear that the Union's letter of February 10, 1954, was intended as notification, under Article VIII of the agreement, of the Union's desire to bring about a general wage change. It is clear, however, that this letter failed to satisfy the requirements of Section 8 (d) (1), which specifies that notice of modification be served either sixty

the employees to meet at reasonable times and confer in good faith * * * : Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification——

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

* * *

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * *

Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

days before the “expiration date” of a bargaining agreement, or, where the agreement does not contain an “expiration date,” sixty days before it is “proposed” to make the modification. Accordingly, if at the time the February 10 letter was written the “expiration date” of the agreement herein is taken to be April 1, 1954, then it is evident that the notice was given only some 51 days before such “expiration date,” and thus was not a timely notice. If, on the other hand, it is said that when the letter was written that agreement contained no “expiration date,” then the letter was defective as an 8 (d) (1) notice because it did not specify when the Union “proposed” to make the wage modification it was seeking.

It also is evident that the Union failed to satisfy the requirements of Section 8 (d) (4) before engaging in strike action against the Respondent. As indicated above, the parties’ agreement renewed itself on April 1, 1954. Consequently, when the Respondent’s employees went on strike on June 21, 1954, there was in effect a bargaining agreement having an “expiration date” of April 1, 1955.⁷ By

⁷In the recent *Lion Oil Company* case, the Board majority said: “The ‘expiration date’ of a contract containing an automatic renewal clause—i.e., an agreement subject to modification or termination upon notice at fixed annual periods—is the earliest date on which modification or termination could be effective. We think the same rule applies to a contract for a fixed term providing for a wage reopening at a prescribed period.” 109 NLRB 680, 684.

As Article VIII of the agreement herein did not provide for a “wage reopening at a prescribed per-

its terms Section 8 (d) (4) required the Respondent's employees to wait until such later date before striking, and their failure so to do caused them to lose their status as employees.

The strikers' loss of status as employees has rendered academic all other issues raised by the complaint against the Respondent. I would therefore dismiss that complaint, and would not issue an Order against the Respondent.

Dated, August 21, 1956, Washington, D. C.

PHILIP RAY RODGERS, Member
National Labor Relations Board.

APPENDIX A

Notice to All Employees Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not threaten our employees with loss of their employee status for engaging in lawful strike activity.

We Will Not discourage membership in Local 2611, Lumber and Sawmill Workers, AFL-CIO, or any other labor organization, by a refusal to rein-

iod"—that Article permitting a wage reopening at any time during the agreement's term—it cannot be said that under the majority view in the Lion Oil case, the 60-day waiting period contemplated by Section 8 (d) (4) is to be computed from the time that the Union gave its wage reopening notice on February 10, 1954.

state any of our employees because of their Union membership or activity, or by discrimination against them in any other manner with respect to their hire or employment tenure, or any term or condition of their employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 2611, Lumber and Sawmill Workers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own free choice, or to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

We Will bargain, collectively, upon request, with Local 2611, Lumber and Sawmill Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below, with respect to rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a written and signed agreement. The bargaining unit is:

All employees at our sawmill and planing operations in Eugene, Oregon, and the log dump and pond located at Springfield, Oregon, ex-

clusive of office and professional employees, guards, and supervisors.

We Will offer all of our employees who were on strike on January 19, 1955, immediate and full reinstatement to their former or substantially equivalent positions, displacing—if necessary—any new employees hired after July 28, 1954. If, after such displacement, there are not enough positions for all such employees, the available positions will be distributed among them in accordance with a seniority system or other nondiscriminatory arrangement heretofore applied in the conduct of our business. Any of our employees, previously on strike, for whom employment is not immediately available will be placed upon a preferential hiring list, priority on such list being determined by the seniority system or other nondiscriminatory practice heretofore applied in the conduct of our business. Thereafter, such employees will be offered reinstatement in accordance with the list, as positions become available, and before other persons are hired for such work. Such reinstatement will be without prejudice to their seniority and other rights and privileges.

We Will make our employees whole for any loss of pay each of them may have suffered as a result of our discriminatory refusal to rehire any of them on January 19, 1955, after their unconditional offer to return.

All of our employees are free to become or remain, or refrain from becoming or remaining members of Local 2611, Lumber and Sawmill Workers,

AFL-CIO, or any other labor organization, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act. We will not discriminate in regard to hire or tenure of employment, or any term or condition of employment, against any employee because of membership in or activity on behalf of any labor organization.

GIUSTINA BROS. LUMBER CO.

Dated

By

(Representative) (Title)

This notice must remain posted for 60 days from its date, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

RESPONDENT'S MOTION FOR RECONSIDERATION

Respondent moves that the Board reconsider its Decision, and, after such reconsideration, dismiss the complaint herein.

The Decision of the majority of the members of the Board concludes:

“As for the position taken by our dissenting colleague we disagree that the strikers should be found to have lost their employee status because of any failure on their part to comply with the provisions of Section 8 (d) of the Act. Insofar as any 8 (d)

issue was raised, the Trial Examiner found that it was limited to 8 (d) (4) and concluded that under the Board's decision in *Lion Oil Company* there was no merit in the contention. In its exceptions to the Board, the Respondent did not take issue with the Trial Examiner's so limiting the 8 (d) issue nor with his failure to consider that 8 (d) (1), (2) or (3) were involved in the case. Also, the Trial Examiner stated that the Respondent sought to justify its refusal to bargain because the employees were on strike. The Respondent excepted to this statement. Necessarily, the Respondent thereby completely negated any reliance upon Section 8 (d) (4). Consequently, we believe that any 8 (d) issue that may have been raised before the Trial Examiner, was thereafter abandoned by the Respondent and the issue is not now before the Board."

We respectfully submit that the majority erred in drawing its conclusions. The majority holds, briefly, that Respondent did not raise the issue of Section 8 (d), but if Respondent did so, Respondent abandoned its position.

The record is to the contrary. Throughout the entire proceeding Respondent has placed Section 8 (d) in issue. In its answer Respondent alleged that the strike was an unfair labor practice strike. Amended Answer, page 2. Respondent by this allegation could only be charging a violation of Section 8 (d). What else could this allegation refer to? To our knowledge a Union can commit an

unfair labor practice strike only by its failure to meet the requirements of Section 8 (d).

In Respondent's Brief to the Trial Examiner, Respondent maintained its position. Respondent wrote:

"As Respondent views the amended complaint in the light of the testimony, the following issues are presented:

5. Did the Union fail to bargain in good faith, as required by the Act, by striking before the termination of the contract?"

and again:

"Apart from these considerations, the Act defining the duty to bargain in good faith requires that the party proposing modifications continue to work without stoppage for 60 days or termination of the contract, whichever later occurs.

It is undisputed that the strike occurred while the contract was in effect. A strike under these conditions is an unfair labor practice.

The strike, accordingly, relieved Respondent of any obligation to deal with Local 2611."

Respondent, as a matter of good faith, advised the Trial Examiner that it rested its defense in part upon the fact that the strike was an unfair labor practice one by the Union; but, in view of the Board's position with reference to the Lion Oil case, did not labor the point. In short, Respondent was preserving the 8 (d) violation for the record.

The Trial Examiner stated parenthetically (R.p. 37, Ll. 41-53):

“The Respondent’s answer also contains a contention, by way of affirmative defense, that the Union’s strike action constituted an unfair labor practice—within the meaning of the statute—apart from its character as a contractual breach; the firm argues, apparently, that the Union ought to be held responsible for a refusal to bargain in good faith because it resorted to strike action prior to the expiration date of the agreement with respect to which it desired to negotiate modifications. See Section 8 (d) (4) of the Act, as amended. It is contended that the strike, therefore, relieved the Respondent of any obligation to deal with the organization. I would find the argument without merit. *Lion Oil Company* 109 NLRB 680, 681-686, 34 LRRM 1410, set aside 221 F. 2d 231 (C.A. 8), pet. for cert. filed July 15, 1955.”

This is the only reference we find in the Report of the Examiner to this issue. The Examiner attempts to summarize Respondent’s argument and qualifies his remarks by the limitation that this is “apparently” Respondent’s argument.

We submit that a parenthetical statement, which is not made as one of fact but amounts at most to a passing comment, is not one of fact as to which exception must be taken. But giving the reference by the Examiner the dignity of a finding, Respondent properly took exception to it. The statement of the Trial Examiner is found on page 37, lines 41 through 53. Respondent’s Exceptions 83, 84 and 85 are as follows:

“83. To the conclusion that Respondent sought

to justify a refusal to bargain upon the existence of a strike (R.p. 37, Ll. 41-54).

“84. To the finding that Respondent dealt with Union through the Willamette Valley Lumber Operators Association after the strike. (R.p. 37, Ll. 57-60).

“85. To the finding that Respondent did not seriously present the issue of an unlawful strike (R.p. 38, Ll. 5-20).”

These exceptions encompass the complete statement of the Trial Examiner.

The majority concludes that the Exception No. 83, was an abandonment by Respondent of the Section 8 (d) issue. Examination of the record destroys this conclusion. The Examiner said: “It is contended that the strike, therefore, relieved Respondent of any obligation to deal with the organization.”

Certainly Respondent took exception to that conclusion. It has been long recognized that the duty of an employer to bargain collectively continues after a strike has been called. A strike per se does not relieve an employer of the obligation to bargain. The Examiner imputed to Respondent a fallacious legal contention. Respondent had not made such a contention. Naturally Respondent excepted to the misleading and erroneous position attributed to it by the Trial Examiner. That exception taken to a contention mistakenly ascribed to Respondent is not and cannot be an abandonment of the 8 (d) issue.

In brief, the majority concluded that an issue

raised in the pleadings, submitted to the Trial Examiner and preserved by exception to the reference of the Examiner to it, is waived because the Brief of Respondent does not contain elaborate argument supporting it. No rule of the Board requires a Respondent to file a brief supporting its exceptions. No rule requires a party to submit its affirmative case. Respondent is not required to submit findings of fact and conclusions of law to support its position.

The rules of the Board, (Sec. 102, 46 (b)), provide that no matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding. This rule is in direct conflict with the Act itself and so is invalid. Section 10 (e) of the Act provides: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The Board rule clearly conflicts with the statute. The statute, of course, controls.

The Board Rules, Sec. 102.46, allow 20 days to file exceptions and supporting Brief with the Board.

In this case the Intermediate Report and Recommended Order consists of forty-four pages of sixty lines each. The transcript is made up of 417 pages. In addition, 20 exhibits were offered. The rules require "precise citation of page and line" of the record. The Examiner does not support his statements and conclusions by appropriate refer-

ences to the record. The burden imposed upon a party excepting to the report is extremely heavy; perhaps too onerous to be carried. Note this example; the Examiner said (R.p. 12, Ll. 21-27):

“(Hughes testified that he had no recollection of any such exchange. Three of the General Counsel’s witnesses, however, attributed the inquiry noted to him, in words or substance. And upon the entire record, indeed, such an inquiry would seem to be consistent with his character and the general tenor of his remarks, as revealed in the stipulation previously noted. I find that he raised the question noted, and received an affirmative reply.)”

This short statement of seven lines requires the examination of (1) all of the testimony of Hughes; (2) all of the testimony of all of the witnesses called by the General Counsel; all of the record and (4) the stipulation of the parties.

Every line of the Report and Recommended Order must be examined with the same minute diligence.

The excepting party then must decide whether to support every exception in his brief or restrict it to a chosen few of the subjects covered. If he should decide to cover every detail, he runs the risk of submerging issues in a mass of detail. The Brief would be of outrageous lengths; it would impose impossible burdens upon the Board.

This Respondent chose to attempt to keep its Brief within reasonable lengths. Even so, its Brief

contained sixty-three pages, too many in our opinion for the most effective presentation of its case.

Under these circumstances a failure to include in the Brief argument supporting a particular exception or exceptions is not an abandonment of the exception or of issues otherwise raised.

The Decision of the Majority raises other serious questions of substance. The Board acts to protect, to advance the public interest, as distinguished from the enforcement of private rights.

It is apparent from the opinion of the majority that the Respondent did not commit an unfair labor practice. The majority finds Respondent guilty because it concluded Respondent waived its defense. But a public right cannot be waived by a party litigant.

The public interest requires that an employer be given justice, although represented by inept counsel, as well as an employee who has settled his claim.

The record establishes that the Union and its members did not comply with Section 8 (d); that at the inception of this proceeding Respondent served notice that it relied upon Section 8 (d) as one defense to the charges against it; that while it did not aggressively prosecute the defense, it did not abandon it.

We submit further that, if it be assumed that Respondent did not raise the issue of non-compliance with Section 8 (d), the Board has raised the issue and Respondent is entitled to the benefit of it. The rule that a party can raise as issues only those matters which exceptions to the intermediate

report present cannot be applied to deprive a party of error appearing in the Decision of the Board.

The Board is charged with the responsibility to administer the rights of the public, irrespective of the position of the parties. Section 10 (d) of the Act empowers the Board to correct any decision made by it before a transcript of the record shall be filed in Court. The Board has accepted this responsibility, Rule 102.49.

The Board has not been reluctant to consider issues not raised by exceptions to the Intermediate Report. See *Item Co.* 108 NLRB 1634.

The result of the decision of the majority is that the members of the Union which violated the Act are rewarded by a reinstatement order with back pay. An award of back pay by the Board is not automatic; it is not to be applied mechanically in all cases. It is only to be ordered in those instances where it will effectuate the purposes of the Act, Section 10 (c). The order of the Board, in this instance, is clearly violative of sound policy. Rewards to those who violate the act do not effectuate its purpose. To the contrary, such law breakers have forfeited those benefits.

The Board may well consider the opinion of the Court of Appeals for the Third Circuit in *N.L.R.B. vs. Spiewak & Son*, 179, Fed. 2d. 695. The Court said:

"The exceptions to the report do not specifically mention the exclusion of the second reason, but are broad enough to include this within their scope. The record squarely presents that problem for our

consideration. We do not think it comes within the language of Section 10 (e) of the Act reading: "No objection not urged before the Board, its member, agent or agency, shall be considered by the court * * *." Even if it were judged to be under that section, the exception reads: "* * * unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The Spiewak reasons for denying reemployment to the six were developed on the Board's own cross-examination. The full significance of that testimony was apparently lost sight of by both sides in the dispute over whether the employer could rely on the 1944 contract for the refusal to take back the six. They failed to see the trees for the forest. The fact that respondents did not rehire the six because of employee opposition is vital to this branch of the litigation, and, in fairness to all concerned, cannot be disregarded."

* * * * *

Since the exceptions were filed by Respondent, the Board has announced its decisions in two cases which have a material bearing upon the issues.

In *Miller Shingle Co.*, 114 N.L.R.B. No. 187, and *Jones and Anderson Logging Company, Inc.*, 114 N.L.R.B. No. 186, the Board ruled that the employers in the Northwest, participating in "industry" negotiations constitute a multi-employer bargaining unit. The Trial Examiner in the instant case found (R.p. 8, Ll. 17-35):

"Various reference in the record suggest that the negotiations thus initiated by the Association

and the District Council, with respect to the wage issue, were part of a larger series involving other operator associations, other organizational units of the Lumber and Sawmill Workers, A.F.L. the International Woodworkers of America, CIO, and various employers whose employees were represented by one or another of these 'rival' labor organizations."

"(At the time, I find, it was a matter of common knowledge in the Pacific Northwest that wage issues in the lumber trade were being negotiated on an 'industry-wide' basis, and that practically every employer in the trade, privy to a labor agreement with an AFL or CIO organization, had been confronted with a wage demand. These negotiations were extensively discussed, in the local press and elsewhere. I find it appropriate, therefore, to take official notice of the fact that the Respondent's indirect involvement with the Union—as previously indicated—constituted a part, only, of the larger series of negotiations, to all intents and purposes 'industry-wide' in scope."

and again (R.p. 9, Ll. 49-53):

"Thereafter, on the 17th of June, representatives of the District Council and the Association met to renew negotiations with respect to the wage issue. Hughes, as a member of the Association committee, was present. The record is silent, however, with respect to the discussion which then eventuated." * * * * *

“(There were additional negotiations, I find, between the Council and the Association committee on July 13 and August 4, 1954. Despite the protestations of President Giustina as to the ease with which he could terminate the Association’s status as his representative, the record establishes that Hughes sat as a member of the Association’s committee on each of the occasions noted.)”

It follows, inescapably, that at all meetings after the strike started between Respondent and Union representatives, Respondent cannot successfully be charged with a refusal to bargain, because the employes of Respondent alone, a member of a multi-employer unit, did not constitute an appropriate bargaining unit.

Respectfully submitted,

/s/ RICHARD R. MORRIS.

[Title of Board and Cause.]

ORDER DENYING MOTION

On August 21, 1956, the Board issued a Decision and Order ¹ in the above-entitled proceeding. Thereafter, on September 4, 1956, counsel for the Respondent filed a Motion for Reconsideration and supporting brief. On September 20, 1956, counsel for the General Counsel filed a response thereto. On September 21, 1956, the charging party filed a brief in opposition to the motion for reconsidera-

¹ 116 NLRB No. 89.

tion. The Board having duly considered the matter,

It Is Hereby Ordered that the aforesaid motion be, and it hereby is, denied on the grounds that the contentions raised in respect to Section 8 (d) were previously considered by the Board and that the new matters presented are without merit.

Dated, Washington, D. C., September 26, 1956.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

[Endorsed]: No. 15625. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Giustina Bros. Lumber Co., Respondent. Transcript of the Record. Petition to Enforce An Order of the National Labor Relations Board.

Filed: September 20, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15625

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GIUSTINA BROS. LUMBER CO.,
Respondent.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Giustina Bros. Lumber Co., Eugene, Oregon, its officers, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as "Giustina Bros. Lumber Co. and Local 2611, Lumber and Sawmill Workers, AFL-CIO," Case No. 36-CA-633.

In support of this petition the Board respectfully shows:

(1) Respondent is an Oregon corporation en-

gaged in business in the State of Oregon, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on August 21, 1956, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, Giustina Bros. Lumber Co., Eugene, Oregon, its officers, agents, successors and assigns. On the same date the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 34 (7) (a) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein

and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors and assigns to comply therewith.

Dated at Washington, D. C. this 10th day of July, 1957.

/s/ STEPHEN LEONARD,
Associate General Counsel.

[Endorsed]: Filed July 15, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT OF ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

To The Honorable, The Judges of the United
States Court of Appeals for the Ninth Circuit:

Giustina Bros. Lumber Co., a corporation duly organized and existing under the laws of the State of Oregon, answers the petition presented to this Court for the enforcement of a certain Order issued by the National Labor Relations Board, herein some times called the Board, against Giustina Bros. Lumber Co. The proceeding in which this Order was issued by the Board is known upon its records as "Giustina Bros. Lumber Co. and Local No. 2611,

Lumber & Sawmill Workers, AFL-CIO," being case number 36-CA-633.

In answer to the Petition of the Board to this Honorable Court, Respondent respectfully:

I.

Admits the allegations of Paragraph I of said petition but denies it committed any unfair labor practice.

II.

Admits that on August 21, 1956, the Board issued its Order directed at Respondent; that a copy thereof was served upon Respondent, and alleges it has no knowledge or information sufficient to form a belief as to whether due proceedings were had before the Board on said matter and therefore denies said allegations.

III.

Denies any knowledge or information sufficient to form a belief as to the matters alleged in Paragraph III.

In further answer to the said Petition of the Board, Respondent alleges that the findings of the Board as to facts are not supported by evidence and more particularly alleges the evidence does not support the following findings of the Board in said matter.

I.

The finding that Respondent violated its obligation to deal with Local 2611 as the exclusive bargaining agent of its employees; and interfered with,

restrained and coerced its employees in the exercise of their statutory rights.

II.

The finding that the strike was converted from an economic strike to an unfair labor practice strike.

III.

The finding that the letter from Respondent to the strikers constituted a threat to the strikers possessing coercive impact.

IV.

The finding that Respondent terminated its contract with the Union to impair the Union's position as representative of the employees; and that such termination was a failure to bargain in good faith and interfered with, restrained and coerced Respondent's employees.

V.

The finding that Respondent prolonged the strike.

VI.

The finding that Union did not breach the contract with Respondent.

VII.

The finding that Local No. 2611 attempted to bargain in good faith.

VIII.

The finding that Respondent discriminated against the strikers to discourage Union member-

ship and concerted activities for mutual aid and protection; and interfered with, restrained and coerced the employees in the exercise of their rights.

IX.

The finding that the strikers did not forfeit their rights as employees.

X.

The finding that Respondent waived its right to raise the question that the strikers forfeited their employment rights by the illegal strike.

XI.

The finding that the strikers were entitled to reinstatement.

XII.

The finding that the strikers were entitled to an award of back pay.

XIII.

The finding that the second shift employees were entitled to reinstatement and employment rights.

In further answer to the said Petition, Respondent alleges that the Board acted without and in excess of its power in making and entering its conclusions of law and order in this matter by reason of lack of evidence on the matters hereinbefore set forth.

Respondent alleges that the objections set forth herein have been urged before the Board, its member, agent or agency.

Wherefore Respondent prays this Honorable

Court that it deny enforcement of the Order of the Board in whole, or, if such prayer be denied, that it deny enforcement of the Order of the Board in such part as it is not supported by evidence as herein set forth, and insofar as denial, relieve Respondent, its officers, agents and representatives of any necessity to comply therewith.

Dated this 31st day of July, 1957.

GIUSTINA BROS. LUMBER CO.,

/s/ By EHRMAN O. GIUSTINA,

/s/ RICHARD R. MORRIS,

Attorney for Respondent.

Duly Verified.

[Endorsed]: Filed July 31, 1957. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

In this proceeding, petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board properly found that respondent interfered with, restrained and coerced its employees, and refused to bargain with the majority representative of its employees in an appropriate unit, thereby violating Section 8 (a) (1) and (5) of the Act.

2. The Board properly found that respondent's

rejection of the unconditional application for reinstatement made by the unfair labor strikers constituted discrimination violative of Section 8 (a) (3) and (1) of the Act.

Dated at Washington, D. C., this 16th day of Aug., 1957.

/s/ STEPHEN LEONARD,
Associate General Counsel, National Labor Relations Board.

[Endorsed]: Filed Aug. 19, 1957. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Nineteenth Region

Case No. 36-CA-633

In the Matter of: Giustina Bros. Lumber Co. and
Local 2611, Lumber and Sawmill Workers,
AFL.

TRANSCRIPT OF PROCEEDINGS

Rooms 315 and 334, Erb Memorial Student Union Building, Eugene, Oregon. Monday, May 9, 1955.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before: Maurice M. Miller, Esq., Trial Examiner.

Appearances: Patrick H. Walker, Esq., 407 U. S. Court House, Seattle, Washington, appearing on behalf of General Counsel, National Labor Relations Board. Donald S. Richardson, Esq., 1003 Corbett Building, Portland, Oregon, appearing on be-

half of Local 2611, Lumber and Sawmill Workers, AFL, the Charging Party. Richard R. Morris, Esq., Failing Building, Portland, Oregon, appearing on behalf of Giustina Bros. Lumber Co., the Respondent. [1]*

Proceedings

* * * * *

Mr. Walker: What has been referred to as Appendix G in Paragraph XV on Page 10 of General Counsel's 2 is one and the same as the instrument marked Exhibit A attached to the amended complaint, which is identified as General Counsel's Exhibit 1-M, and, for that reason, after drafting General Counsel's Exhibit 2, you will note that there is no Appendix G attached to General Counsel's Exhibit 2.

Mr. Morris: Mr. Examiner, for the sake of clarity, I would suggest that Paragraph XV then in the stipulation be amended to recite that the copy is attached to the amended complaint as Exhibit A, rather than referring to the missing Exhibit G. It might simplify it for someone else who might have to read this.

Trial Examiner: Does that suggestion meet with the approval of the General Counsel and you, Mr. Richardson?

Mr. Walker: That's agreeable.

Mr. Richardson: Yes.

Trial Examiner: Very well, on that representation, I will suggest, since all parties concur, that

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

General Counsel's Exhibit 2 in evidence be amended in Paragraph XV thereof, by striking the words in the third line thereof, appearing after the word "appended", specifically striking the words "hereto and marked Appendix G", and substituting for that phrase the words, "to the amended complaint in this case as Exhibit A", so that [23] the sentence, in which the amendment now suggested appears, would then read as follows:

"On or about August 5, 1954, by a letter bearing that date, a copy of which is appended to the amended complaint as Exhibit A, was sent by the Respondent by mail * * *," et cetera.

Does that meet with the approval of all parties?

Mr. Morris: Satisfactory.

Mr. Richardson: Yes.

Mr. Walker: That's agreeable.

Trial Examiner: Very well, the record will show that it is so amended. [24]

* * * * *

ELDON KRAAL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Walker): Your name is Eldon Kraal? A. That's right.

Q. Spelled K-r-a-a-l, is that correct?

A. Correct.

Q. And, Mr. Kraal, what is your—rather, by whom are you employed now? [25]

(Testimony of Eldon Kraal.)

A. By the Willamette Valley District Council of Lumber and Sawmill Workers, AFL.

Q. And what is your position with them?

A. I'm Executive Secretary of the Council.

Q. How long have you held the position of Executive Secretary to the District Council?

A. Since 1947.

Q. And do you know whether or not Local 2611 in the year 1954 was a member of the Willamette Valley District Council?

A. The local was a member of the Council.

Q. And in addition to Local 2611, were there other locals members of the Council in the year 1954?

A. I didn't quite understand you.

Q. In addition to Local 2611, were there any other locals who were members of the Council in the year 1954?

A. Yes, there was.

Q. Now, the record shows that on or about February 10, you, as Secretary to the Council, sent a letter to Giustina Brothers Lumber Company, and a copy of that letter appears as Appendix B to General Counsel's Exhibit 2, which I now show you.

Was a like or a similar letter sent to any other employers on or about the same time, which employers are operating in the Willamette Valley area?

A. Yes. [26]

* * * * *

Q. Now, for the entire period of time that you have been Secretary of the Willamette Valley Dis-

(Testimony of Eldon Kraal.)

trict Council, do you know whether or not that method of collective bargaining has occurred between the Council and the various employers who have contracts with the various locals affiliated with the Council?

A. Well, traditionally, since my term of office as Secretary of the Council, negotiations have been carried on between [30] committees representing the District Council and committees representing the employers, who, as far as my knowledge goes, the employers' committees in many cases were chosen through their employers association, and there was also employers within this District who had contracts with various local unions and also with Local Union 2611, who did their own negotiations. In other words, the employers in some cases negotiated with the Council independently of the association.

Q. And by "independently", do you mean directly with the association?

A. With, yes, directly.

Q. Rather than—with the Council, rather than through the association? A. Yes.

Q. Now, what subject matters have been negotiated between the employers who are represented by the committees of the association and the committees of the Council?

A. Well, do you mean in all the years?

Q. In all of the years.

A. That I've been in an official capacity?

Q. Yes, sir.

(Testimony of Eldon Kraal.)

A. Well, usually for the most part we have negotiated rates of pay, pay raises, and also such things as vacation pay, hours of labor clauses, but not in recent years. We've negotiated nothing in recent years except matters of wages, wage rates.

Q. Now, in recent years, how far back do you mean? [31]

A. Well, I would almost have to check the record to get right down to details, but I'd say within the last three or four years there's been no negotiations except on matters of wages.

* * * * *

Q. (By Mr. Walker): No negotiations on any subject?

A. We have negotiated no matters with any employers in the last several years except matters of wages.

Q. All right. Now, the record shows that there were negotiations on certain dates from April to August in 1954 between the Council representatives and representatives of the association. What subject matters in the year 1954 in those negotiations were discussed with the representatives of the Council and the representatives of the association?

A. The matter of wage increases.

Q. Anything else?

A. Nothing that I know of.

Q. Calling your attention to Article XIII of Appendix A to General Counsel's Exhibit 2, can you state whether or not the Council on behalf of any locals in 1954 acted under Article XIII?

(Testimony of Eldon Kraal.)

A. The Council did not. [32]

Mr. Morris: May my continuing objection apply?

Trial Examiner: To the extent that the question may possibly elicit information with respect to the Council's relationship to employers other than Giustina Brothers, I will consider your continuing objection is still applicable. For the record, the objection is overruled.

Q. (By Mr. Walker): Do you know whether or not in the year 1954 Local 2611 took any action under Article XIII with respect to Giustina Brothers? A. None that I'm aware of.

Q. Do you know whether or not any of the locals affiliated with the District Council in 1954 took any action under Article XIII?

A. I'm not aware of any cases of that.

Q. In your capacity, if any had occurred, would you know of it?

A. Perhaps so, but not necessarily in all cases.

Q. In the negotiations between representatives of the association and representatives of the Council on the mentioned dates between April and August, 1954, was any subject, other than or in addition to wages, discussed between those representatives? A. No, sir.

Q. Mr. Kraal, would you turn to Appendix F attached to General Counsel's Exhibit 2? At any time since April 13th, 1954, the date of that letter, have you received any letter from Giustina [33] or from the association revoking the authorization of the association? A. No, sir. [34]

(Testimony of Eldon Kraal.)

Cross Examination * * * * *

Q. (By Mr. Morris): Well, are you two the negotiating committee of the Willamette Valley District Council? A. Am I what?

Q. Are you and Mr. Howden the negotiating [39] committee of the Willamette Valley District Council? A. Not necessarily.

Q. Are you, or aren't you?

* * * * *

The Witness: We were not supposed to. Our committee of the Council, we were not even requested by the company to be present. I was there as representing the Council, the District Council, to assist the local union. Mr. Howden is the Business Agent of the local union. Therefore, we were not acting, either one of us, in the capacity of the negotiating committee for the Willamette Valley District Council. I can't answer it any plainer than that. [40]

* * * * *

SAM E. HUGHES

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Walker): Your name is Sam E. Hughes? A. Yes.

Q. And, Mr. Hughes, by whom are you employed?

A. Giustina Brothers Lumber Company.

Q. In what capacity?

(Testimony of Sam E. Hughes.)

A. Labor Relations Director.

Q. How long have you held that position?

A. I've been employed by the company since 1951. [41]

* * * * *

Q. All right. On July 28th, in the evening, were you at the machine shop located on the premises of Giustina Lumber Company?

A. I was there during a portion of the evening.

Q. Were you present in the shop of the company on that date of July 28th at a time when approximately 22 individuals were assembled there in the shop? A. Yes.

Mr. Morris: Is that the same meeting referred to in General Counsel's 2?

Mr. Walker: That's right.

Q. (By Mr. Walker): Now, what time did you arrive at the shop?

A. It was rather late, Mr. Walker. I would say after 10 o'clock.

Q. Well, about when with respect to 10 o'clock?

A. I would be inclined to say somewhere [52] between 10:30 and 10:45, although that is an estimate at this time.

Q. Was Mr. Nat Giustina in the shop that night of July 28th where there was an assemblage of approximately 22 individuals? A. Yes, he was.

Q. And he was there at the time the 22 individuals were assembled, is that right? Oh, of course, the stipulation shows that.

Mr. Morris: I think we stipulated that.

(Testimony of Sam E. Hughes.)

Q. (By Mr. Walker): What time did Mr. Nat Giustina arrive at the shop?

A. Well, approximately the same time I did, Mr. Walker.

Q. How did you get to the shop that night?

A. By automobile.

Q. Whose? A. Mr. Giustina's.

Q. Which one?

A. Mr. Nat Giustina's, as I recall. [53]

* * * * *

Q. (By Mr. Walker): Mr. Hughes, with respect to the reference in Paragraph 13 of General Counsel's 2, and particularly on Page 4, Line 7 of the second paragraph—second full paragraph, the sentence appears:

“The shop had been used in the past for employee meetings.”

Q. Do you find that?

A. Yes.

Q. Now, had the shop in the past or at any time prior to July 28th, 1954, ever been used for general employee meetings?

A. It is my understanding that it had, Mr. Walker.

Q. Hadn't the shop only been used in the past for meetings of employees for schooling them on grading?

A. Not as far as I know, no; other things.

Q. General assemblies of plant employees?

A. That is my understanding.

Q. Now, what is the source of your information?

(Testimony of Sam E. Hughes.)

A. The common knowledge of the employees at the plant, as well as the general management.

Q. At any time since 1951, since you have been in the employ of the company, have there ever been general employee meetings in the shop?

A. None in which I have participated. However, I understand there has been at least one that I recall to mind.

Q. And general employee meetings for purposes other than conducting a grading school? [60]

A. Yes. [61]

* * * * *

Q. (By Mr. Walker): Well, in the past, has the company called the employees of the company to assemble in the shop for company meetings additional to conducting a grading school?

A. It is my understanding they have.

Q. And when, prior to July 28th, 1954, was the last meeting?

A. I would be unable to state a specific date. I was not in attendance at the meeting which I understand was held.

Q. Was that a meeting of all employees in the employ of the company at that time?

A. A meeting of all who wished to attend.

Q. Was the meeting of those who wished to attend for a limited purpose?

A. Do you mean that—

Mr. Morris: I object to that question. That's asking this witness to testify as to the purpose of other people who might attend a meeting.

(Testimony of Sam E. Hughes.)

Q. (By Mr. Walker): Do you know why the meeting was called?

A. One of the subjects——

Mr. Morris: Answer the question.

The Witness: Yes, I believe so.

Q. (By Mr. Walker): All right, what was it?

A. One subject that was discussed one time was a welfare fund.

Q. A discussion of the welfare fund affecting employees? A. Yes.

Q. And was it a discussion between representatives of management and the employees? [62]

A. Employees only, as far as I know. [63]

* * * * *

Q. (By Mr. Walker): And, lastly, Mr. Hughes, did you ascertain the date upon which the company received through the mails from the Portland Sub-regional Office a copy of the petition filed by Glenn Winey, which has been received in the record as General Counsel's Exhibit 3?

A. The notification bears the date stamp of 27 August 1954. [78]

* * * * *

LELAND JAMES HOWDEN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Walker): Will you state your name, please? A. Leland James Howden.

(Testimony of Leland James Howden.)

Q. And where do you reside?

A. 480 Horn Lane, Eugene, Oregon.

Q. By whom are you employed?

A. Lumber and Sawmill Workers Local Union No. 2611.

Q. In what capacity?

A. Financial Secretary and Business Agent.

Q. And how long have you held the position of Secretary of that local? A. About 1948.

Q. And how long have you held the position of Business Agent with the local?

A. Since 1951. [85]

* * * * *

Q. Now, in the files and records of the local, when they were delivered over to you by your predecessor, did you learn whether or not there was in existence an agreement which had been entered into between the Giustina Company and the local in 1943? A. Yes, sir.

Q. And was that an agreement dated March 31, 1943?

A. I'm not certain of the date. [86]

Q. All right. If you would refer to Appendix A to General Counsel's Exhibit 2, and particularly the first page thereof, the second line, does that refresh your recollection as to the date on which the agreement came into being?

A. It was, I make sure of that.

Q. Now, following the entry of that agreement on March 31, 1943, how long did that remain in effect unchanged?

(Testimony of Leland James Howden.)

A. Until November something in 1949—the 9th of November, I believe.

Q. Well, again, if you'll refer to Appendix A——

A. The 8th of November.

Q. The 3rd, isn't it?

A. The 3rd? I ought to have glasses.

Trial Examiner: Let the record show that the witness has referred Exhibit A to me, and the Examiner, with the aid of glasses, reads it to read the 3rd day of November, 1949.

The Witness: I need glasses.

Q. (By Mr. Walker): Did you participate in your capacity in any negotiations which led up to the revision of the March 31, 1943, agreement into the November 3rd, 1949, agreement?

A. I did.

Q. When did those negotiations occur, if you can recall, with respect to the date when the revised agreement was executed?

A. I think I must have been there the evening of November 3rd. [87]

Q. I believe you misunderstand my question. When did the negotiations occur with respect to the date when the agreement was reached?

A. As far as my memory goes, there was only one meeting.

Q. How did those negotiations come about?

A. I believe it must have been mutually agreed to change the contract and include it all in one.

Q. Now, did the agreement then remain in ef-

(Testimony of Leland James Howden.)

fect and unchanged until a later date? A. Yes.

Q. And when last was—strike that.

The record shows that Appendix A came into being on May 8th, 1953. Now, between November 3, 1949, and May 8th, 1953, were there any negotiations between the—strike that—did any negotiations occur pursuant to Article VIII of the agreement? A. Yes.

Q. And when did those negotiations pursuant to Article VIII occur?

A. During late 1949 and early 1950, again in August and September of 1950, 1951—I don't recall the time, it must have been in the spring.

Q. All right, now—

A. Twice in the spring of '51.

Q. With respect to the negotiations on wages [88] that occurred in early 1950, who conducted those negotiations?

A. To my knowledge, the District Council and the Operators Association.

Q. And the negotiations that occurred in September, 1950, who conducted those negotiations?

A. The Council, and the Operators Association.

Q. And in the spring of 1951, who conducted the negotiations?

A. By the Council and the Operators Association, and there was two different, if I remember correctly, two different settlements.

Q. Now, in 1952, was any action taken pursuant to Article VIII of the agreement? A. Yes.

Q. And what was that?

(Testimony of Leland James Howden.)

A. At that meeting, a 12 and a half cent settlement between the—was recommended by the Operators Association and the District Council back to the individual operators and the local unions for a settlement of 12 and one-half cents.

Q. And when was that in 1952?

A. Settlement was some time in May, I believe.

Q. Now, referring to Article XIII of Appendix A to General Counsel's 2, between November 3, 1949, and May 8, 1953, did the local take any action at any time pursuant to that article?

A. May I have the question again?

Mr. Walker: Will you read the question, [89] please?

(Question read.)

The Witness: In the old contract, it was Article XIV, Terminations, the old contract. So, by using it, in January of 1953, the local did ask to revise Article I, III, IV, V, VI and VII of the then existing contract.

Q. (By Mr. Walker): January of what year was that? A. '53.

Q. All right, and upon whom was that notice served?

A. Upon Giustina Brothers Lumber Company.

Q. Thereafter, did the company take any action under the provisions of Article XIII?

A. Yes, sir.

Q. And what was that?

A. They served notice that they were opening on Article II, IX, X, XI, XII, XIII and XIV of

(Testimony of Leland James Howden.)

the contract then in existence, making everything open for discussion except wages.

Q. After the exchange of those notices, did negotiations occur? A. They did.

Q. And who conducted your negotiations for the local? A. I did.

Q. And who conducted negotiations for the employer? A. Sam E. Hughes.

Q. Did the association represent the employer in those negotiations? A. No. [90]

Q. Did the Council represent the union in those negotiations? A. No.

Q. As a result of those negotiations then, the instrument which is marked as Appendix A, the revision of May 8th, 1953, came into being?

A. Yes, sir.

Q. Now, during those negotiations between the local and the company, what contentions, as you recall, were advanced by the employer to bring about the revision? A. Revisions of what?

Q. Well, the revisions which led up to the completed agreement?

A. Well, we made a lot of them. We was the ones that originally opened the contract.

Q. All right.

A. We wanted some changes.

Q. Was there any discussion on Article II, and that Article II is the plant committee article?

A. And grievance procedures.

Q. And was there any discussions on Article IX, the strike and lockout provisions?

(Testimony of Leland James Howden.)

A. Yes, sir.

Q. Who advanced contentions relative to the agreement—strike that.

Who advanced contentions which brought about [91] the adoption of those two clauses?

A. The company did.

Q. And will you relate your recollection of what the contentions were as advanced by the company?

A. The main thing that the company wanted on strike procedure in there was over the grievances between their company and the union. They didn't want any more re-occurrences of what had happened in 1951.

Q. And what—that statement standing alone is meaningless. So, would you relate what occurred in 1951?

A. In 1951, there were some wage scales given to me by the company, and I had duplicates—had copies made of that, and I had took them out and gave them to each of the plant committee at the planing mill and at the sawmill. Then during the noon hour, or some time in the afternoon, or just as the whistle blew to go to work after dinner, a man handed one back to the plant committee, and the plant committee told the man to go back to work, and he hung it up on a nail.

In the meantime, a plant committeeman at the sawmill had posted one on the bulletin board. So, Orville Basset, the superintendent of the planing mill, saw this one hanging on a nail and tore it

(Testimony of Leland James Howden.)

down and went and talked to Mr. Hughes and called him on the phone.

Shortly thereafter, Mr. Hughes got a hold of me over the phone and arranged for a meeting [92] with me for the following Thursday, I believe, to discuss the matter of posting the wage scale.

Q. Well, to shorten it, was there a dispute—did a grievance arise by reason of this situation?

A. In the one plant, yes.

Q. And the employees at the plant attempted to effect a grievance by engaging in an unannounced strike action, is that correct?

A. Yes, without my knowledge.

Q. Now, at any time during those negotiation meetings between the local and the company representatives, in discussing Article II and IX, was there any reference made to wages in respect to the contentions advanced by the company?

A. Not as to this point. There was only one thing in the whole meetings that I can remember that wages was ever mentioned.

Q. Well, now, in attempting to persuade the union to adopt Articles II and IX, did the company make any reference to wages as being applicable to the provisions of Articles II and IX?

A. No, sir.

Q. In advancing the contentions of the company during those negotiations, were—how did the company refer to Article II and Article IX?

(Testimony of Leland James Howden.)

A. As grievances, like the strike in '51, the stoppage.

Q. In those discussions on those two articles in the course of negotiations, were references made to [93] the two articles separately or jointly?

A. Article II and Article IX usually in negotiations towards the last—they would go right through II and into IX. Towards the last, we were going through the whole contract, go through II and then later come into IX.

Q. Now, prior to April 1, 1954, did the union give the company a notice as provided for in Article XIII, the termination clause, of Appendix A to General Counsel's 2?

Mr. Morris: I think that calls for a conclusion. I suggest that he ask the question: What notice has been given?

Mr. Walker: Read the question, please.

(Question read.)

Mr. Walker: I'll revise it.

Q. (By Mr. Walker): With respect to the termination clause, Article XIII of Appendix A to General Counsel's Exhibit 2, between December, 1953, and April 1, 1954, did the union deliver anything to the company?

Mr. Morris: The same objection.

Trial Examiner: Objection overruled.

The Witness: We did not deliver anything, no, on the termination.

Q. (By Mr. Walker): At any time between December, 1953, and April 1, 1954, did the local take

(Testimony of Leland James Howden.)

any action under the termination clause with respect to the Giustina Company?

A. No, sir. [94]

* * * * *

Q. (By Mr. Walker): Now, does the local have collective bargaining agreements with employers other than Giustina? [96] A. Yes, sir.

Q. And with respect to those agreements, in the year 1954, did the local under the termination clause open the agreements for negotiations for modifications or changes of the contract?

Mr. Morris: Does my continuing objection of yesterday still continue as to this type of interrogation?

Trial Examiner: Now that you've mentioned it, it does.

Mr. Morris: Thank you.

Trial Examiner: For the record, the objection is overruled.

The Witness: We opened no contracts for changes.

Q. (By Mr. Walker): With respect to the agreements between the local and other operators, was any action taken pursuant to Article VIII, the wage clause?

A. The Council opened on wages with all employers. Some of them is not Article VIII. The Council opened on the locals' behalf.

Q. Now, as to those employers, the other employers, with whom the local has agreements, who

(Testimony of Leland James Howden.)

represented the local in those negotiations on wages?

A. The District Council negotiating committee.

Trial Examiner: Mr. Howden, just to clarify your previous response when you said that the Council opened on the locals' behalf with all the employers with whom you had contracts, but with some of them it was not Article VIII, am I correct in inferring that you meant to say that the [97] Council opened the wage issue with all employers with whom they had contracts, but that for some of those employers the particular clause in the contract, on which they reopened, was not Article VIII under their agreements?

The Witness: That's right, sir. [98]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Morris): By what authority, Mr. Howden, did the District Council purport to act for the local unions in opening the contracts for negotiation?

A. Shall I report on another part of this? I think it's in here. Back years ago, in 1948, the District Council was given permanent authority to act on general wage raises for the local unions.

Q. How was that permanent authority recorded?

A. It was in writing.

Q. In writing? A. Yes.

Q. Did the local union take action to authorize that to be done? A. It did. [99]

* * * * *

(Testimony of Leland James Howden.)

Redirect Examination

Q. (By Mr. Walker): What was the issue involved in the industry-wide strike in 1945?

A. It's only on hearsay on that.

Q. Oh, if you don't know, all right. Now, did the grievance which occurred in 1951 arise over the posting of wage scales, or over the negotiation of wage scales?

A. The posting.

Mr. Walker: I have nothing further.

Mr. Morris: Nothing further.

Trial Examiner: Mr. Howden, you've indicated that you expect to check the union's records with respect to the type of action which the union took to give the Council authority to negotiate, and it may be that some of the questions that I have will be covered by your records. If so, you just advise me of that fact, and we'll defer the matter.

I'm interested in determining the manner in which that authority is actually conferred upon the Council or was conferred upon the Council. You testified that the local union took formal action to delegate to the Council the authority to negotiate certain things. [110]

* * * * *

Trial Examiner: Well, then, if the records would not show, what is your present recollection as to the areas within which the union remains free to negotiate?

* * * * *

The Witness: We have the right to negotiate on everything but wages. [113]

* * * * *

(Testimony of Leland James Howden.)

Q. (By Mr. Walker): Now, on June 20th, 1954, did you have occasion to meet with either of the Giustinas? A. I met with Nat Giustina.

Q. Where? A. At the company office.

Q. And was anyone else present? A. No.

Q. Anyone with you? A. No.

Q. Did you have a conversation with him?

A. Yes.

Q. And what was said by you?

A. I asked him if he wanted to make an offer on the wage issue, as a Council representative, and told him that, if he even made a half a cent offer, I'd turn it in, but he and I both knew it would be turned down. So, he may as well make it a nickel if he was making any kind of an offer.

Q. And did he reply?

A. He said, "There will be no offer."

Q. Was there anything else said then at that time between the two of you? [119]

A. I think something, "Well, I guess this is it then", or to that effect, and his reply was, "Well, I don't think you boys would do it."

Q. And did that conclude that conversation?

A. That is the essence of the conversation. [120]

* * * * *

Q. All right. Were there any other meetings of any nature between July 28th and August 10th?

A. Yes.

Q. When? A. August 1st and August 8th.

Q. And at either of those meetings, was there any formal union action taken with respect to the

(Testimony of Leland James Howden.)

events of July 28th as reflected in Paragraph XIII of General Counsel's Exhibit 2? XIII begins on Page 3 and, of course, continues through to the middle of Page 10. However, my question was just simply limited to the fact of the meeting of July 28th in the company shop.

A. There was some talk and formal action taken on August the 8th, which was a crew meeting of Giustina's members that were working inside and members working outside, who, by vote, agreed to go back in a group if they would go back under action of the local union, and I don't know exactly how that motion was made.

Q. All right. [129]

* * * * *

Recross Examination * * * * *

Q. (By Mr. Morris): Prior to the meeting of June 7th, did you not tell Mr. Hughes that, if the company attempted to negotiate the wage issue with you and the plant committee, it would force a strike?

* * * * *

The Witness: No.

Q. (By Mr. Morris): Is it not a fact, Mr. Howden, that you did make such a statement to Mr. Hughes within a few days after the meeting of June 7th in his office?

A. Not in those words.

Q. Well, what words did you use?

A. I stated that, if they persisted in trying to talk to the plant committee, when the Council had

(Testimony of Leland James Howden.)

the right of negotiation, that the machinery was set up and ready, and it might cause a strike prior to the deadline. [138]

* * * * *

Redirect Examination * * * * *

Trial Examiner: With relation to the meeting of August 31st, when, according to the stipulation, the Governors' proposals were presented to Giustina Brothers, can you give us any background information as to just exactly how that meeting was set up, at whose instance it was arranged, how it was arranged, and what understanding there was before the meeting was held as to what it would cover?

The Witness: My face would get red in one place.

Trial Examiner: Pardon?

The Witness: My face would be red in one place. The Council had gotten copies of the Governors' proposal in here on the afternoon of the 27th, which was Friday, I believe. I'm not too sure of that. August 27th was on Friday?

Trial Examiner: That's correct.

The Witness: We got the papers. We were told to go and secure the signatures of the operators on that. [142] * * * * *

ELDON KRAAL

having been previously sworn, resumed the stand:

Redirect Examination

Q. (By Mr. Walker): In the month of June,

(Testimony of Eldon Kraal.)

1954, how many operators were in contractual relations with locals affiliated with the Council?

A. Mr. Walker, I would have to answer your question from memory more or less, but I'd come pretty close.

Q. All right.

A. I couldn't testify as to the exact number, but I could make a close statement. I would say 79 or 80, somewhere around that.

Q. Now, of the number of 79 or 80 operators—strike that.

Were all of those 79 or 80 operators notified of the general wage demand at that time?

A. They had been all notified prior to that time.

Q. Of the 79 or 80 operators, prior to June 21, 1954, had any settled on the wage demand?

A. Prior to June 21?

Q. Yes.

A. Yes, sir, there was several of them that had settled.

Q. About how many?

A. I would say 30 or 32, along there, maybe more, maybe less.

Q. Now, of the remaining number of 79 or 80 operators, how many settled on the wage issue between the beginning of the strike and the Governors' proposal?

A. Well, making another estimate or a guess, I would say 20 some, maybe 23 or 25, along in there.

Q. Now, of the remaining number of 79 or 80

(Testimony of Eldon Kraal.)

[151] operators, were there any that settled after the Governors' proposal issued?

A. Yes, there was. The settlements that came after the Governors' proposal was settled on the basis of the proposal.

Q. And how many?

A. Well, the remaining number except one, whatever it is. I'm not good enough at mental arithmetic to remember. If I were to add it up, I would say it would be in the 20s perhaps.

Q. All right. Then who was the operator who never settled on wage issues either after the strike began or after the Governors' proposal issued?

A. Giustina Brothers Lumber Company. [152]

* * * * *

Recross Examination * * * * *

Q. (By Mr. Morris): Well, what is the relationship between the National Council and the District Council?

A. How it affects wages or wage issues, or do you mean all?

Q. I'm referring to negotiations, negotiation matters only, Mr. Kraal.

A. Well, I would say—I would answer that question by saying the Willamette Valley District Council is one of the District Councils who are affiliated with the Northwestern Council, Lumber and Sawmill Workers, and last year, 1954, and several years in the past, over-all wage questions, on those, the District Council—the Willamette Valley District Council and other District Councils have

(Testimony of Eldon Kraal.)

authorized the over-all wage negotiations to be coordinated through the Northwestern Council and [154] its Executive Committee, and in that coordination, the policy—some of the policy, at least, from time to time are made up—I'm talking of union policies.

Q. That's correct.

A. Union matters are made up and agreed upon. After these policies have been reached and agreed upon by District Councils, the procedure has been to make every effort to carry out successful negotiations on those policies.

Q. Was not that coordinating procedure followed in 1954, Mr. Kraal? A. Yes, it was.

Q. And was not the decision that after August 26th the settlements would be on the basis of the Governors' proposal, a coordinated policy decision by the National Council? A. Right.

* * * * *

DEAN E. SPARKS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Walker): Will you state your name, please, Mr. Sparks? [155]

A. Dean E. Sparks.

Q. Did you work at the Giustina plant in 1954 up to the beginning of the strike on June 21?

A. Yes, I did.

(Testimony of Dean E. Sparks.)

Q. And between June 21 and July 28, what was your status? A. Well——

Q. Well, did you join the strike? A. Yes.

Q. Now, did you attend a union meeting on July 28th, a meeting of Local 2611? A. Yes.

Q. Did you remain at the meeting until it ended? A. Yes.

Q. At about what time did the meeting end, as near as you can now recall?

A. Oh, originally about 8:30.

Q. Pardon me? A. About 8:30.

Q. And following the conclusion of the meeting, what did you do immediately after the meeting?

A. Immediately after the meeting, we went down—we went out and down the street and into a beer joint there for a beer.

Q. You mentioned “we went down”. Who did you mean by “we”?

A. Well, there was myself, Johnny Zybach, [156] Louis Wright, Larry Keopke, and Orville Bloom.

Q. While you were in the—strike that.

Do you know a Clifford Johnson?

A. I do.

Q. While you were in the beer parlor, did you see Mr. Johnson? A. I did.

Q. And did he say—strike that.

At the beer parlor, were all of the men you mentioned grouped together? A. Yes, they were.

Q. While you were in the beer parlor, did Clif-

(Testimony of Dean E. Sparks.)

ford Johnson have a conversation with you—between you and the men?

Mr. Morris: May we have him identified?

Mr. Walker: Pardon?

Mr. Morris: May we have him identified?

Mr. Walker: Clifford Johnson?

Mr. Morris: Yes, sir.

Q. (By Mr. Walker): Was Clifford Johnson in the employ of the company prior to the strike of June 21? A. He was.

Q. And then from June 21 to July 28th, was he a striker? A. He was.

Q. Did you have a conversation with him at that time in the beer parlor? [157]

* * * * *

The Witness: I don't know if I said anything to him or not.

Q. (By Mr. Walker): Well, did Johnson say anything to the group of you? A. He did.

Q. And what was it he said to you?

* * * * *

The Witness: I heard Mr. Johnson say—he asked us as a group if we would like to attend a secret meeting that was being held in the Giustina Brothers machine shop.

Q. (By Mr. Walker): Now, is it your recollection whether Johnson at that time said anything about a secret meeting at the Giustina parking lot?

A. He may have mentioned the parking lot, but I do know that he said we were going to have it in the shop, machine shop. [158]

(Testimony of Dean E. Sparks.)

Q. Did you—and by “you”, I mean the group of you—go to that secret meeting at the Giustina shop? A. We did. [159]

* * * * *

G. LOUIS WRIGHT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [191]

Direct Examination

Q. (By Mr. Walker): Will you state your full name, please? A. G. Louis Wright.

Q. And where do you live?

A. I live in Eugene.

Q. And prior to June 21, 1954, were you working at the Giustina plant? A. I was.

Q. In what capacity? A. My job?

Q. Yes.

A. I was driving carrier at the last.

Q. On June 21, 1954, did you join the strike?

A. I did.

Q. Did you attend a union meeting of Local 2611 on July 28th? A. I did.

Q. And after the meeting—strike that.

Were you present in the hearing room when Mr. Sparks testified? A. I was at all times.

Q. And are you here under subpoena from the Counsel for the General Counsel? A. I am.

Q. Now, after the union meeting, were you in the beer parlor with those individuals mentioned by Mr. Sparks? A. I was. [192]

(Testimony of G. Louis Wright.)

Q. And do you know Mr. Johnson? A. Yes.

Q. Did he come to you fellows in the beer parlor that night? A. He did.

Q. Did he say anything to you? A. Yes.

Q. What was it he said?

A. There was going to be a secret meeting out at Giustinas in the shop and, if we were interested in going back to work, to come on out.

Q. And following that, the five of you drove in your car to the end of First Street opposite the north end of the shop, is that correct? A. Yes.

* * * * *

Q. And after that car stopped, did you see somebody get out of it? A. I did.

Q. Was the individual who got out of it [193] walking in any peculiar manner, do you know?

A. One was.

Q. In what way? A. On crutches.

Q. All right. Now, did you notice that individual enter the shop?

A. I might not have noticed him enter the shop, but he was headed in that direction. [194]

* * * * *

ORVILLE BLOOM

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Walker): Will you state your name, please? A. Orville Bloom.

(Testimony of Orville Bloom.)

Q. And do you live in Eugene?

A. No. I live in Coburg.

Q. Where? A. In Coburg.

Q. Is that a suburb to Eugene?

A. That's right.

Q. Now, have you been present here when Mr. Sparks and Mr. Wright testified? A. Pardon?

Q. Were you here while Mr. Sparks and Mr. Wright testified? A. I was. [202]

Q. And did you hear their testimony?

A. I did.

Q. Are you here under subpoena issued by me?

A. I am.

Q. Did you work in the Giustina plant up until June 21, 1954? A. I did.

Q. And what was your job?

A. Planer feeder.

Q. On June 21, '54, did you go on strike?

A. Yes.

Q. And on June 28, 1954, did you attend a union meeting of Local 2611?

A. What was that?

Q. Did you attend a union meeting on July 28th? A. Yes.

Q. After the union meeting, you went to the beer parlor along with the other individuals identified by Mr. Sparks, is that correct?

A. That's right.

Q. And do you know Mr. Johnson?

A. I do.

(Testimony of Orville Bloom.)

Q. While you were there, did Mr. Johnson come up to the group? A. Yes.

Q. And did he say something to the group?

A. He did. [203]

Q. And what did he say?

A. He says, "You fellows going out to the meeting, the secret meeting?", and we says, well, we didn't know of any meeting. We asked him where it was at, and he told us.

Q. What did he say?

A. And he says, "You fellows want to come on out."

Q. Did he say where the meeting was to be?

A. Yes.

Q. Where? A. Giustina shop.

Q. Did he mention anything about the Giustina parking lot?

A. No, I don't believe he did, that I can remember.

Q. All right, and then the five of you went to the shop in Mr. Wright's car, is that right?

A. That's right. [204]

* * * * *

JOHNNY ZYBACH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Walker): Your name is Johnny Zybach? A. Yes.

(Testimony of Johnny Zybach.)

Q. And you live in Eugene? A. Yes.

Q. Where are you—were you employed at the Giustina plant up till June 21st, 1954?

A. Yes.

Q. And what was your job?

A. Well, I had several of them. I was a carrier driver and I was tying some.

Q. Did you go on strike on June 21st?

A. Yes.

Q. And you attended a union meeting of Local 2611 on July 28th? A. Yes.

Q. And were you present here while Mr. Sparks, Mr. Bloom and Mr. Wright testified?

A. I was.

Q. Did you hear their testimony? A. Yes.

Q. Are you here under subpena?

A. Yes. [209]

A. At my request? A. Yes.

Q. Now, do you know Mr. Johnson?

A. Yes.

Q. What is your recollection of what Mr. Johnson said to you men at the beer parlor?

A. Well, he asked us if we was going to the meeting. We asked him what meeting—someone did, and he said, "The secret meeting at the shop."

Q. Did Mr. Johnson mention the meeting at the parking lot?

A. No. I believe the question came up: Which shop? What they meant by the shop? I think he said, "The one by the parking lot."

(Testimony of Johnny Zybach.)

Q. All right. About what time did you men arrive at the shop?

A. Oh, it was between 9:30 and — about 9:30 probably. [210]

* * * * *

Trial Examiner: Mr. Zybach, at the time that you and the other individuals in your car entered the shop, did you have occasion to observe whether there were other persons who came to the meeting after you did, or were you among the last ones to come?

The Witness: Well, we was among the last, but there was a few—two or three maybe—that come after we did. [215]

* * * * *

NATALE BERNARD GIUSTINA

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Morris): Your name, please?

A. Natale Bernard Giustina.

Q. You're the Nat Giustina that's been referred to in the testimony in this proceeding?

A. I am.

Q. What position do you hold with Giustina Brothers Lumber Co.?

A. I am President and General Manager.

Q. How long have you held that position?

A. Since July the 1st, 1948.

(Testimony of Natale Bernard Giustina.)

Q. And how long have you been employed by Respondent in this proceeding? [221]

A. Steadily since June, 1941, and intermittently since 1933. [222]

* * * * *

Q. Did the woods employees remain with 2574 until June 21, 1954? A. And still are.

Q. Will you describe the relationship between the company and 2611 from 1940-41, when you acquired knowledge of it, to June 21, 1954? That is, were you bickering constantly, or peaceful, or just what?

A. No. I think you'd say that the relationship has been very good over the years with the one exception of the so-called quickie strike in '51 over—I guess I can say—a misunderstanding of intent.

Q. How many grievance meetings would you say occurred between the end of the strike in 1945 and 1951?

A. There wouldn't be four to six a year on an average.

Q. How many between 1951 and June 21, 1954?

A. Again I am—this is—if I gave an answer, I mean I could not be sure. I know it's been on the increase, but still maybe not over one a month. That would be on the outside.

Q. Do you recall, Mr. Giustina, whether the company made proposals for contract changes in 1953? A. Yes.

Q. And what was your purpose in making those proposals? [223]

(Testimony of Natale Bernard Giustina.)

A. There were several things in the contract that we wanted changed so that we would eliminate a lot of misunderstanding that had caused some of our grievances in the past.

Q. Well, what were you trying to accomplish?

A. A better working relationship between the company and the employees.

Q. With reference to no strike action during the term of the contract, what was your purpose?

A. We wanted to stop these so-called quickie strikes like we'd had in '51.

Q. Referring to Exhibit A—pardon me—I think that's Appendix A in General Counsel's Exhibit No. 2, I call your attention to Articles I and II. Will you read those, please, and testify from the standpoint of Respondent what those articles were intended to accomplish?

A. Did you wish me to read Article I and II?

Q. Well, if you're familiar with them, no.

A. I mean, read them to myself?

Q. Yes, read them so you can answer the question. A. I'm ready for the question.

Mr. Morris: Will you read the question, please?

(Question read.)

The Witness: Well, Article I was intended to also show that the union had some responsibility in continued employment, good working conditions, and to see that the operation operated efficiently, [224] with good workmanship, and that we maintain good relations between the company, the em-

(Testimony of Natale Bernard Giustina.)

ployees, and the public—the consumer that used our product.

Mr. Walker: Just a moment. May I object? It appears to me the witness is reading the instrument, and the instrument, of course, speaks for itself.

Trial Examiner: Well, the answer on its face appears to be germane to the question. If that's the best answer the witness is capable of giving, the record will so show. I'll overrule the objection.

The Witness: Article II, which is under the plant committee, spells out what the plant committee is to do, spells out what a grievance is, which had always been a bone of contention before, puts some time limits on it, also spells out that a person who has a grievance must attend the meetings.

In other words, it was designed to try and clarify misunderstandings that we'd been having with the union over the past several years. [225]

* * * * *

Q. (By Mr. Morris): Was there a meeting held between representatives of the company and union representatives on June 7, 1954?

A. Yes, sir. * * * * * [228]

Q. Did the representatives of the company make any effort to discuss the wage proposal and problems involved in connection with it?

A. I think one of the first things that I asked them was if they were in to discuss the wages, and I was told "no", that they couldn't. I asked them why, and they said because their authority had

(Testimony of Natale Bernard Giustina.)

been given to the District Council, and then they added, "You can't negotiate," and I asked them what they meant I couldn't negotiate, and I was ready, willing and able to negotiate, and they says, "No, you've given your authority to the association, and there isn't anything you can do on it." [229] I said, "The hell I can't. The association doesn't tell me or any other operator what we have to do," and I repeated, "All I have to do is pick up the telephone and tell Mr. Metzger of the association that he no longer represents me, and that I am at this moment ready, willing and able to negotiate," if they wanted to talk.

Q. Was there a meeting on June 28th between representatives of the Respondent and the Local 2611?

A. Yes, there was.

Q. Where was that meeting held?

A. In our office.

Q. Who represented the company?

A. Mr. Ehrman Giustina, Mr. Sam Hughes, and myself.

Q. Who represented the union?

A. Mr. Howden and several members of the plant committee.

Q. Who called the meeting?

A. The company.

Q. And what was the purpose of the meeting?

A. The primary purpose of the meeting was—we had then been on strike for approximately a week. Our hospital coverage of the men, a prepaid monthly thing, was due, and we wanted to ask the

(Testimony of Natale Bernard Giustina.)

committee if they wanted the month of July hospital dues, if it was all right with them, if we withheld the hospital dues for the month of July out of their checks so that the men would be covered. [230]

Q. At that meeting, was there any discussion of the wage issue involved in the strike?

A. Yes, sir.

Q. What was that discussion?

A. It was very similar to the meeting of June the 7th, in which again we asked if they wanted to discuss the wages. They said, "Yes, make us an offer." I said, "I'll make you an offer. Wages and working conditions as they were when you went on strike." They said, "Well, we can't talk to you by authority of the District Council." [231]

* * * * *

Q. Has the night shift or a second shift been resumed since June 21, 1954?

A. No, sir. [233]

* * * * *

Q. Did you consider at that time, Mr. Giustina, the effect which the acquisition of Mount June would have upon the log supply available to you?

A. Yes, sir.

Q. And what effect would that have?

A. Well, we were in a position, if we exercised the option to purchase the company, whether or not we would run the Mount June mill, which would take additional logs, and, naturally, we couldn't. If we kept operating the mill, there was

(Testimony of Natale Bernard Giustina.)

no particular percentage in buying the timber. It would just take up that much more. We wanted the timber to extend the life of our present operations.

Q. Was consideration given to the effect that the acquisition and the operation of Mount June would have upon the continuance of the second shift? A. Yes, sir.

Q. And what was that consideration?

A. We knew that one way or another that the mill was going to have to be operated—— [234]

* * * * *

The Witness: We had known in the discussions that we had had with different people in regards to this mill, either we were going to have to operate it ourselves, or, if we leased it, we were going to have to furnish logs for it for a period of one or two years. That would at least be part of their logs. So, we knew that we were not going to have logs available for the second shift operation. [235]

* * * * *

Q. Upon exercise of the option to acquire Mount June, did you make any commitments as to supplying logs to the operation of the Mount June sawmill? A. Yes, we did.

Q. Is that commitment still in effect?

A. Yes, it is.

Q. Do you have any present plans to resume the operation of the second shift in the sawmill and planing mill? A. No, sir. [236]

* * * * *

(Testimony of Natale Bernard Giustina.)

Q. Now, with reference to the meeting of July 28th, how did you get there?

A. I beg your pardon?

Q. What means of transportation did you use to get to the meeting of July 28th?

A. I rode with my brother in his car, as I remember.

Q. What was your physical condition at that time?

A. I had a broken left knee cap, and I was on crutches and a cast—my left leg in a full cast.

Q. When you reached the shop, who went into the shop first among the three of you?

A. I can't recall who went in first.

Q. What was the physical condition of the shop with reference to benches, and so on?

A. Well, there were benches set up in the center or south central end of the shop, and the men were milling around. [242]

* * * * *

Q. I hand you General Counsel's Exhibit No. 2 and call your attention to—strike that, please.

I hand you a copy of the complaint and call your attention to Exhibit A of the complaint. [245]

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Morris): Will you read it, please?

A. I have read it.

Q. Do you know whether a letter similar in content was sent to the woods employees of Gius-

(Testimony of Natale Bernard Giustina.)

tiana Brothers Lumber Company? A. Yes.

Q. Do you know when it was sent?

A. The following day.

Q. Do you know, Mr. Giustina, whether the letter, Exhibit A, was sent to the night shift men, who had been on the night shift prior to June 21?

A. Yes, I do.

Q. Was it sent? A. Yes.

Q. Why?

A. Well, we didn't want to get in any difficulty, not knowing whether or not the seniority would apply, how many men would return. There had been a good number of employees that terminated their employment during the strike, and not wanting to discriminate against any of them, we thought the best thing to do was to send the letter to everyone and see what happened from there.

Q. Referring to General Counsel's Exhibit [246] No. 2, Appendix K, were you familiar with the content of that letter? A. Yes.

Q. I see that you signed it. A. Yes.

Q. Did you discuss the position of the company in regard to that letter with Ehrman Giustina and Sam Hughes before it was sent?

A. Yes, I did.

Q. And what were the reasons for sending that letter?

A. Well, things were kind of in a jumbled mess, as I remember. The men had come through the picket line. There had been a petition for decertification. We felt that to get the air clear and try

(Testimony of Natale Bernard Giustina.)

and find out where we were, why, we sent this.

Q. Was any consideration given to the strike by 2611 as a breach of the contract in connection with sending that letter? A. Yes.

Mr. Richardson: I object to that. The witness has answered the question and given us reasons already.

Mr. Morris: No; this is a different question. You must have misunderstood it.

Trial Examiner: I'll sustain the objection.

Mr. Morris: I'll certainly take an exception to that.

Trial Examiner: I may say it's based upon its leading character.

Mr. Morris: I was trying to identify the [247] subject matter. I didn't forecast an answer. I asked if consideration was given.

Trial Examiner: My ruling stands. You're at liberty to pursue the subject matter of the question, however, by some other question.

Q. (By Mr. Morris): Were any other matters given consideration in connection with the letter of September 2, Appendix K? A. Yes, sir.

Q. What other matters?

A. The fact that the local gave consideration that we had broken the contract. [248]

* * * * *

Q. Page 11, Paragraph XVII. You will note several statements by Mr. Hughes with reference to what was said at that meeting. Will you read those, please, and state whether they correctly set

(Testimony of Natale Bernard Giustina.)

forth the position of the company at that time?

* * * * * [251]

The Witness: Yes, they do.

Q. (By Mr. Morris): What were the reasons [252] for taking that position, Mr. Giustina?

A. Well, in discussing it with Mr. Hughes prior to the meeting, it was our understanding that, because the bargaining unit had been questioned, that he could not negotiate with that said unit.

Trial Examiner: Just a moment. I want to get one thing clear. When you used the words "bargaining unit", Mr. Giustina, you're using the word that has a special meaning in this field. Did you mean that there had been a question raised as to the group of employees for which the union might bargain, or did you mean a question had been raised with respect to the right of the union to speak for a particular group of employees?

The Witness: The latter, I would say, sir?

Trial Examiner: So, would I be correct, gentlemen, in assuming that the witness intended to speak of a question being raised as to the bargaining agency, rather than the bargaining unit?

Mr. Morris: That is a more correct expression.

The Witness: Yes.

Trial Examiner: Very well.

Q. (By Mr. Morris): Mr. Giustina, bearing in mind the date August 31, 1954, to your knowledge has any representative of Local 2611 requested a meeting with Giustina Brothers to negotiate any matter?

A. No, sir. [253]

* * * * *

(Testimony of Natale Bernard Giustina.)

Q. Calling your attention, Mr. Giustina, to the topic of meetings of groups of employees at the shop or elsewhere on company property, state whether or not such meetings were held prior to July 28th, 1954? A. Yes, they were.

Q. Were company representatives always in attendance at such meetings? A. No, sir.

Q. Would you have any way of knowing why the meetings were being held, for what purpose?

A. Well, it's kind of a difficult one to answer in some respects because—to pinpoint it exactly—the shop has always been used, as long as I can remember, for employee meetings of different types.

Now, there have been grading schools, which have been mentioned earlier. There have been safety meetings and first aid classes. I can remember several instances when the men have asked to use the shop as a meeting place, when maybe somebody's house burned down or somebody's wife was sick and they wanted to raise some money amongst the crew to help the fellow out.

Q. Can you recall of an instance when the company refused to permit a meeting of a group of employees in the shop? A. No, sir. [257]

Mr. Morris: Your witness.

Cross Examination

* * * * *

Q. (By Mr. Walker): Now, such meetings as occurred at the shop as first aid, safety, grading school, those were all called by the company, were they not? A. Usually, yes.

(Testimony of Natale Bernard Giustina.)

Q. And the other meetings where permission to use the shop by a group of employees was not refused in instances of collecting some money for benefit of somebody's wife, permission was always sought of the company in advance, was it not? [258]

A. Normally, yes. * * * * * [259]

Q. (By Mr. Richardson): Now, at any time prior to the trial of this case, this hearing, were you—had you notified Mr. Howden or any other representative of the union or the Council that the strike was a breach of the collective bargaining agreement? [260]

A. Would you repeat that question, please?

Mr. Richardson: Would you read the question, please?

(Question read.)

Mr. Morris: When you say "you", do you mean Mr. Giustina personally?

Mr. Richardson: I'll restrict this question to Mr. Giustina personally.

The Witness: No, I had not.

Q. (By Mr. Richardson): And to your knowledge, has any other management representative of your company, prior to this hearing, notified any representatives of the union or the Council that the strike commencing June 21, 1954, was a breach of the collective bargaining agreement?

A. Not in those words.

Q. In any words?

A. I think that the letter of September the 2nd speaks generally along those lines.

(Testimony of Natale Bernard Giustina.)

Q. I don't argue with you, Mr. Giustina. The letter of September the 2nd speaks for itself.

A. I mean, other than the letter of September the 2nd, I don't know.

Q. I see. That would be the extent of it, the letter of September 2, 1954?

A. As far as my knowledge goes. [261]

* * * * *

Q. In other words, when the second shift was discontinued then, it would only be those employees who did not have sufficient seniority to displace new employees on the day shift, who would be completely terminated?

A. Along with knowledge, training, skill and ability, that is correct. [263]

* * * * *

Trial Examiner: What was the situation with respect to log supply thereafter? In other words, thinking now of the period from June 21st, 1954, up until the acquisition of the Mount June property, what was the situation with respect to log supply? Did your own woods operations begin?

The Witness: We had purchased a Government sale of some 20 million feet that we had hoped to log in the fall and winter of '54 and the first of '55. Due to the strike, we were unable to build the bridges and roads necessary because we lost those two good months in there.

Therefore, that source of supply was practically negligible. We got a few logs, but very little. We're still not getting them. [271]

* * * * *

(Testimony of Natale Bernard Giustina.)

Trial Examiner: Then what was the situation with respect to log supply during the late summer and fall of 1954? Where were you getting logs?

The Witness: Just about all over.

* * * * *

Trial Examiner: How successful were those efforts in terms of accumulation of a log supply? In other words, what level of supply were you able to build up at the log dump, pond, and elsewhere?

The Witness: As I remember, we got up to about a couple months' inventory ahead.

Trial Examiner: When did you reach that level?

The Witness: About January 1st. That's the date we try to hit, as I said, usually two and a half to three months. This year we had two months.

* * * * *

Trial Examiner: When did you begin to derive a log supply for use either at the Mount June mill or elsewhere from the Mount June timber properties?

The Witness: Immediately.

Trial Examiner: Immediately. Now, you gave testimony to the effect that you had certain commitments with respect to the operation of the Mount June mill, and some of the timber derived from the Mount June woods supply was to be diverted to the operation of the Mount June mill. Do I correctly understand that?

The Witness: Not necessarily; not necessarily timber from the Mount June lands—just timber supply, we were obligated on.

(Testimony of Natale Bernard Giustina.)

Trial Examiner: Very well. My next question then is whether the immediate derivation of timber supplies from the Mount June lands enabled—was [273] a factor enabling you to build up a log supply at your log dump and pond in Springfield to the extent you previously indicated? In other words, did timber from the Mount June lands come into the log dump and pond here for the use of your sawmill and planing mill at Eugene?

The Witness: Yes. However, the greatest advantage has been since the first of the year because of the amount of roads that are in the area, and we've been able to go in and get logs out during this unusual wet weather we've had up until the last couple weeks.

* * * * *

Redirect Examination

Q. (By Mr. Morris): With reference to the 1954 second shift at the sawmill, Mr. Giustina, would you characterize that shift as temporary or permanent?

A. Well, the second shift is always—has always been a temporary shift in our operation. [274]

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EHRMAN V. GIUSTINA

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Morris): Your name, please?

A. Ehrman V. Giustina.

(Testimony of Ehrman V. Giustina.)

Q. And how do you spell Ehrman?

A. E-h-r-m-a-n?

Q. You're employed by Giustina Brothers Lumber Co., the Respondent in this case?

A. Yes, sir.

Q. In what capacity?

A. Production and Operation Manager.

Q. How long have you been so employed?

A. I've held that position since 1948.

Q. You're a brother of Nat Giustina, who just testified? A. Yes, sir.

Q. And you're the individual who has been referred to throughout quite a bit of the testimony as Ehrman? A. That's right. * * * * * [279]

Mr. Morris: Now, I would like to ask the general question here if he will testify the same as Mr. Nat Giustina as to the Mount June Forest Products option, what was done on it in its exercise.

* * * * *

Q. (By Mr. Morris): You heard Mr. Nat Giustina's testimony as to the option, the cruise, the exercise of the option. If you were asked the specific questions, would your answers be substantially the same? A. Yes, sir.

Q. Reference has been made to a meeting of June 7, 1954, Mr. Giustina. Were you present?

A. Yes, I believe it was June 7th, a date right near the first of June.

Q. Who else was present, first, for the company?

(Testimony of Ehrman V. Giustina.)

A. If this was the last meeting before the strike, there was present Nat Giustina, Mr. Sam Hughes, and myself.

Q. Who was present for Local 2611?

A. There was Mr. Howden and a committee which was composed of a grader named Carlson, I think Iley Casteel, Hatton, and there was two or three other men there, but I don't recall [281] right offhand.

* * * * *

Q. Were you present at the meeting of June 28th, 1954? A. Yes, I was. [283]

* * * * *

Q. Well, will you just state for the record, please, as best you can recall, what was mentioned during the meeting by the various people?

A. Nat asked them if they wanted to negotiate on the strike, or how the strike situation was. I believe it was Howden that answered, "Well, you can make us an offer, but we can't do anything about it." Nat then said, "We'll go back to work with the same wages and working conditions as they were when we left." That was about the essence of the conversation.

Q. Were you present at the meeting of July 28th at the shop? A. Yes, I was.

Q. How did you get there?

A. I drove over in my car.

Q. Did anyone go with you?

A. Yes, Nat and Sam rode over with me.

Q. What was Nat's physical condition?

(Testimony of Ehrman V. Giustina.)

A. He had a broken left knee cap at the time, was in a cast, and was wearing crutches. [284]

* * * * *

Q. With reference to benches, what was the physical setup within the shop? Were there any?

A. Well, there was a big tractor sitting over in the corner, and this side of it was a bunch of blocks of wood and planks laid across these, and several men seated and some standing. It looked as if there had been a group of people there for some time.

* * * * *

Q. Were you present at the meeting of August 31? A. I was.

Q. Had you and Sam and Nat discussed the position of the company with reference to that meeting in advance? A. We did.

Q. And what were the reasons for the position taken by the company as you recall them, of course?

A. The reasons taken at this meeting?

Q. Yes. If you don't recall them, just say so.

A. No, I don't recall them now.

Trial Examiner: You're welcome to look at the exhibit with [288] respect to the meeting to see if it refreshes your recollection.

Q. (By Mr. Morris): I think it's Paragraph XVII, Page 11. A. Yes.

Q. After reading that paragraph, is your memory refreshed as to the reasons, Mr. Giustina?

A. Right. There was a question on whether the—a question arose on the status of the union as the

(Testimony of Ehrman V. Giustina.)

bargaining agent, and, as long as that was in doubt, there was nothing we could do. [289]

* * * * *

After July 29, what segment of your mill operations first got under way?

A. Was July the 29th the date the boys went back to work, to clear myself on that?

Mr. Morris: The meeting was July 28th.

The Witness: They went back the next?

Q. (By Mr. Walker): Yes.

A. We ran the resaw end of the plant and loaded cars.

Q. Now, that's the planer department, isn't it?

A. No, sir.

Q. Then when did you, following July 29, when did you put the sawmill into operation?

A. A part of the sawmill started July 29th, sir, the resaw department.

Q. That's the resaw?

A. Yes, sir, that's part of the sawmill.

Q. Well, how many men does it take to run the resaw part of the mill?

A. About eight less than to run the complete plant.

Q. And then when did you—how many?

A. About eight.

Q. Less than a full mill complement?

A. Yes, sir, we had about 30 men there.

Q. You had 30 men where? [295]

A. Excuse me, sir. We had 41 men to run the

(Testimony of Ehrman V. Giustina.)

sawmill. We had about 30 men working, or 32 men working in the sawmill department on the 29th.

Q. When you say the sawmill department, are you including the loading crew? A. No, sir.

Q. All right. Then by what date did you get the full sawmill in operation?

A. The headrig started, sir, about 10 days to two weeks later.

Q. And then when did you get the planing mill in operation?

A. Basically, about the same time. It had run a little bit before. [296]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Walker): Now, with respect to the meeting of July 28th at the shop, after you and Mr. Hughes and your brother arrived and were standing over by Mr. Hurd's office, and before the group of men assembled in the south central area of the shop, had you noticed the men were carrying benches over there to that south central area? [300]

A. Sir, we were not standing next to Mr. Hurd's office, Number 1, and Number 2, the plant was—I should say—the shop was set up with benches, and there was quite a cloud of smoke inside the shop.

Q. Well, are you saying that the benches were not carried over to the south central area while you were in the shop? A. No, sir.

* * * * *

(Testimony of Ehrman V. Giustina.)

The Witness: Excuse me. The benches were set up when we entered the shop. Does that answer it?

* * * * *

Q. (By Mr. Richardson): Mr. Giustina, with reference again to the July 28th meeting, you testified, I believe, that you and your brother, Nat, and Mr. Hughes arrived in your car. What is the make and model?

A. What meeting are you speaking of?

Q. July 28th, 1954. A. All right, sir.

* * * * *

A. What do you mean by that?

Q. I mean: Just what was the occasion?

A. Why we came there? [305]

Q. Yes. Why you got in your car and started out?

A. We had a phone call from Mr. Hughes.

Q. You received a phone call?

A. From Mr. Hughes.

* * * * *

Q. And where were you at that time?

A. At a private home.

Q. Your own? A. No, sir.

Q. Your brother's?

A. No, sir; a party. [306]

* * * * *

Q. (By Mr. Richardson): Mr. Giustina, referring again to the [309] consultation among the three representatives prior to the—the three representatives of the company prior to August 31, 1954,

(Testimony of Ehrman V. Giustina.)

meeting, what was the decision of those representatives with respect to the Governors' proposal that had just shortly prior thereto been announced?

* * * * *

The Witness: The status of the union was in question at that time, and we didn't feel that we should bargain with them. [310]

* * * * *

Trial Examiner: I have one problem that I wanted to explore very briefly, Mr. Giustina. I believe your testimony is that the night shift that was in operation just before the strike had been instituted some time in May, 1954?

(Testimony of Ehrman V. Giustina.)

The Witness: I think it was the latter part of April, as [312] I recall.

Trial Examiner: The latter part of April?

The Witness: I think so. Don't hold me to it.

Trial Examiner: Was that decision to institute the night shift a decision reached by the company management independently of consultation with any other persons?

The Witness: That was reached, sir — we had gone through the winter in good shape and come into the spring with a surplus of logs, and, if we see that we have three months supply of logs on hand or more extra, we will start the shift for that period of time, and that's what the situation was then.

Trial Examiner: So, that was a company decision based upon those considerations you just outlined?

The Witness: That's right. [313]

* * * * *

LELAND JAMES HOWDEN

having been previously sworn, resumed the stand:

Recross Examination

[320]

* * * * *

Mr. Morris: I propose a stipulation that the minutes of the meeting held February 4, 1948, of Local 2611, Lumber and Sawmill Workers Union, AFL, contain the following — will you read it, please, Mr. Howden?

The Witness: Motion made and seconded and

(Testimony of Leland James Howden.)

carried to have the Secretary write the Willamette Valley District Council, notifying them to continue negotiating with the operators for more wage increase.

Q. (By Mr. Morris): That's the end of the action taken? A. There was another motion.

Q. In regard to this subject matter, Mr. Howden? A. Unless you want me to read this.

Mr. Richardson: I think it should be read.

The Witness: Delegates to the Willamette Valley District Council were instructed to vote for strike if same came to a vote.

Mr. Richardson: I think another excerpt should be read, these few lines here, Mr. Morris.

Mr. Morris: I have no objection. [321]

Mr. Richardson: And that the stipulation include the portion of the minutes which Mr. Howden is about to read precedes the portion that he has already read.

Mr. Morris: So stipulated.

The Witness: Motion, seconded and carried to accept the seven and one-half cents per hour raise across the board.

Mr. Morris: Thank you.

Trial Examiner: Do you join in that stipulation, Mr. Walker?

Mr. Walker: So stipulated.

Trial Examiner: It's so stipulated that the union minutes read as just read for the record?

Mr. Walker: So stipulated.

Trial Examiner: Very well, the stipulation is received for the record. [322]

* * * * *

SAM E. HUGHES

a witness called by and on behalf of the Respondent, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Morris): You have already been sworn, Mr. Hughes, and you have testified earlier in this cause? A. Yes. [325]

* * * * *

Q. Since August 31 of 1954, Mr. Hughes, has there been any request made by anyone claiming to represent the employees in the sawmill, planer and log pond, to engage in collective [327] bargaining?

A. Not that I know of, sir.

Q. Did you attend the meeting of June 7th, 1954? A. Yes, sir. [328]

* * * * *

Q. Does that complete what you recall?

A. Mr. Giustina made no further comments on that line that I can recall at this time. Mr. Howden made a comment.

Q. What was his comment?

A. I can't recall it verbatim, but my recollection is that it was to the effect that negotiations by the plant committees, those persons who were present, on the wage issue could not be undertaken.

Q. After the meeting of June 7th, did you have

(Testimony of Sam E. Hughes.)

a meeting with Mr. Howden at which there was some mention made of the ability of either party to negotiate the wage issue?

A. I will again refer to the calendar which I have before me. There was another meeting at which Mr. Howden and myself discussed the matter.

Q. Who was present at this meeting to which you refer?

A. Mr. Howden and myself.

* * * * *

Q. When did it take place?

A. On June the 11th, 1954.

Q. Will you state, as best you can, what was said and by whom at that meeting?

A. I asked Mr. Howden if there were any pending grievances [330] which had not been resolved, or which were not adequately taken care of at that time. He told me that there were not. I further asked Mr. Howden if it was true that they could not negotiate with us because their authority had been given away. Mr. Howden replied in the affirmative that they could not negotiate with us.

He further related that, after the meeting on June the 7th, upon return to his home, as I recall he stated his home, he had had a phone call from the District Council. In the phone call, he was asked if we had attempted to negotiate with the plant committees. He told them, no, we had not negotiated on the wage issue.

As I recall, he stated that he was thereupon told

(Testimony of Sam E. Hughes.)

that it was a good thing because, if we had, we would have been on strike the next day. [331]

* * * * *

Q. Now, with reference to the meeting of June 28th, Mr. Hughes, were the persons who previously have been identified present at that meeting?

A. As far as I recollect, yes, sir. [332]

* * * * *

Q. What was the discussion with reference to the wage and strike situation at that meeting?

A. As I recall, Mr. Howden made a statement that he would be willing to take an offer to the District Council. Mr. Nat Giustina indicated that there would be no offer, other than a statement that we were ready and willing to go back to work on the wages and working conditions in effect at the commencement of the work stoppage.

Q. Was there any response to that from Mr. Howden or other union representatives there?

A. Mr. Howden indicated, as I recall it, that would not be acceptable to the District Council. They would not allow any such settlement.

Q. Now, with reference to the meeting of July 28th, 1954, Mr. Hughes, did you receive a telephone call the night of July 28th? A. I did.

Q. Where were you? A. At my home.

Q. Do you know or do you recall who called you? A. I do.

Q. Who telephoned you?

A. A man whose name was Robertson, as I recall.

(Testimony of Sam E. Hughes.)

Q. Is Robertson an employee of Giustina Brothers? [333]

A. He had been and he was at that time as far as I know.

Q. And what was the conversation with him over the telephone?

A. He indicated that there was a group of men who wanted to talk to someone from the company. I heard something about bitches. I asked if it was their desire to talk to me. I was told that it was. I asked if it was permissible to bring anyone else along. I was told that it was.

Whereupon, I stated that it would be a few minutes before I would be out.

Q. Did he tell you where the meeting was?

A. As I recall, he did, yes, sir.

Q. Where did he say it was?

A. At the shop.

Q. Did you raise any objection—pardon me—that's covered by the stipulation.

What did you do after the conclusion of the telephone call with Mr. Robertson?

A. Well, the first thing I did was, as I recall—

Q. I'm not asking you if you brushed your teeth. Did you make a telephone call?

A. I was just going to say that I took my pajamas off and put my clothes on, which is what I did, as I recall. I didn't brush my teeth. Yes, I made another telephone call.

Q. And to whom did you call?

A. I called the home of Ehrman Giustina. [334]

(Testimony of Sam E. Hughes.)

Q. Did you reach him there? A. No, sir.

Q. Were you given any information on your call to Mr. Ehrman Giustina's home as to where you could reach him? A. I was.

Q. And what did you do then?

A. I tried to reach him at the place where I had been informed he could be reached.

Q. Were you successful? A. I was.

Q. As a result of these telephone calls, did you go to the plant of Giustina Brothers?

A. I did.

Q. Where did you go in the plant?

A. I went to the main office, which is located on or near Second and Garfield.

Q. Ultimately you went from there to the shop?

A. I did.

Q. How did you get there?

A. As I recall, I rode in a car.

Q. Whose car?

A. As I recall, that of Ehrman Giustina's.

Q. Anyone else in the car? A. There was.

Q. Who? [335]

A. His brother, Nat Giustina.

Q. You attended the meeting, Mr. Hughes. That's not a question. When you got to the shop, did you go into the shop? A. I did.

Q. What was the appearance within the shop as you entered?

A. There were a considerable number of persons in the shop. As I recall, I entered through the small door of the shop located near the west

(Testimony of Sam E. Hughes.)

side in the lean-to which I previously described. I walked toward the rear of the shop where there were a group of men. It seemed to be a larger number of men than there was any place else.

There was talk. Men were smoking. There were pieces of equipment in the shop, tools, all the rest of the material that was ordinarily found there.

* * * * * [336]

Trial Examiner: Why was the week of August 8th, 1954, selected as a date for reference in the heading of Respondent's Exhibit 6?

The Witness: That was, as I recall, selected because of a request made by Mr. Walker for certain information, the commencement of operations in the sawmill on a full schedule having resumed in the week of August the 8th. August the 8th, as I recall, was a Sunday; August the 9th was a Monday, and on that date, to which reference is made in the complaint, the sawmill operation was back in full production—or full operating capacity, I should say.

Trial Examiner: You had a sufficient crew to maintain what you describe as full operating capacity?

The Witness: Yes, sir.

* * * * * [367]

(Testimony of Sam E. Hughes.)

Cross Examination * * * * *

Q. (By Mr. Walker): Now, relating to the evening of July 28th, what time did you receive that telephone call from Mr. Robertson?

A. Well, it was late in the evening. As I said, I was practically prepared to go to bed. My usual bedtime is after 9:30. So, I would say that it was after 9:30 at the earliest and it could have been close to 10 o'clock or 10:15, but I couldn't say the exact time.

Q. Now, when Mr. Robertson, in talking to you on the phone, said he wanted you to come down to the plant, that there was a group of men there who wanted to talk to the company, did you ask him what the group of men wanted to talk to you about?

A. I believe I mentioned that I caught the word "bitches" spoken over the phone. I couldn't tell you whether that was Mr. Robertson who stated it, or whether it was someone who was nearby. I did hear other persons in the immediate area and that term or that word is one that is customarily applied to matters that are in controversy, as con-

(Testimony of Sam E. Hughes.)

trusted to—well, the dictionary meaning of the word.

Q. Well, what matters were in controversy at that time?

A. Well, I imagine the biggest thing that was uppermost in the minds of a lot of the men was how much longer the strike was going to last.

* * * * * [386]

Q. When did you first learn that there was a group of men gathered at the shop?

A. On the evening of July the 28th, 1954.

Q. No time prior to that? A. No.

Q. When did you learn that there were a group of men who were interested in going back to work?

A. On the 21st of June, 1954. * * * * * [390]

Q. When did you first receive the original of Respondent's Exhibit 4, or your copy of Respondent's Exhibit 4?

A. I couldn't tell you the exact date. However, I think I could tie it down to an exact date that you could ascertain.

Q. Well, what's your present recollection?

A. My present recollection is that I saw this at a meeting called on the instance and behalf of Mr. Rodney Tunks of the NLRB. He was investigating certain matters then before the Board. The signed copy, from which I assume this came, as I recall, was present at that meeting. * * * * *

Q. (By Mr. Richardson): Your answer is that your recollection is there was no request to bargain between August 31, '54, and January 8th, '55?

(Testimony of Sam E. Hughes.)

A. That is correct.

Q. And then none again after January 8th, 1955, until January 19th, 1955?

Mr. Morris: He said "between." He didn't say "until."

Q. (By Mr. Richardson): Between January 8th and 19th, is that correct?

A. That's my recollection. * * * * * [404]

LELAND JAMES HOWDEN

a witness called in rebuttal by and on behalf of the General Counsel, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Walker): Mr. Howden, were you present in the hearing room during the time Mr. Nat Giustina testified this morning? [409]

A. I was.

Q. I call your attention to testimony of Mr. Giustina to the effect that on a meeting at the company office on June the 28th, Mr. Giustina testified that he asked you if you considered the contract, which is Appendix A to General Counsel's Exhibit 2, was broken? A. He asked that?

Q. Did he say—did he ask you such a question?

A. No.

Q. Mr. Giustina testified further that, after asking the question as testified to by him, that your answer to it was "No." Was that your reply to such a question?

(Testimony of Leland James Howden.)

A. There was no question. I did not answer so.

Q. At that meeting of July 28th, what did Mr. Giustina ask you with respect to the status of the contract?

A. May I qualify my statement by explaining when it happened?

Q. All right.

A. As the meeting broke up over the negotiations of this deduction of two months hospital dues, or hospital dues for the month of July, as it broke up and I was on my feet and almost out the door leaving the room, Mr. Nat Giustina asked me, "Jim, is the contract in force?," and I answered, "Yes," and then he said, "We just wanted to know your opinion."

Mr. Walker: Nothing more. * * * * * [410]

Certificate

This is to certify that the attached proceedings before the National Labor Relations Board for the 19th Region in the matter of Giustina Bros. Lumber Co. and Local 2611, Lumber and Sawmill Workers, AFL, Case No. 36-CA-633, Eugene, Oregon, May 9-11, 1955, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,
Official Reporters,

/s/ By M. J. MONTGOMERY,
Field Reporter.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GIUSTINA BROS. LUMBER CO., RESPONDENT

On Petition for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD

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FILED

NOV 12 1957



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In the United States Court of Appeals
for the Ninth Circuit

No. 15,625

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GIUSTINA BROS. LUMBER CO., RESPONDENT

On Petition for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order issued against respondent on August 21, 1956. The Board's decision and order (R. 214)¹ are reported at 116 NLRB 700. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred at respondent's lumber mill in Eugene, Oregon, where respondent-

¹ References designated "R." are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence. Relevant provisions of the Act appear in the Appendix, *infra*, pp. 38-41.

ent is admittedly engaged in interstate commerce (R. 101; 18).

STATEMENT OF THE CASE

Briefly, the Board found that respondent committed violations of Section 8 (a) (1), (3), and (5) of the Act, respectively, by attempting through threats and other unlawful interference to break a strike of its employees, by subsequently rejecting an unconditional application for reinstatement of the strikers, and by refusing to bargain with the union which represented its employees. The subsidiary facts upon which these findings are based may be summarized as follows:

I. The Board's Findings of Fact

A. The Union, pursuant to the wage renegotiation provisions of its contract, requests a wage increase, and calls a strike when respondent rejects the request

Respondent and the Union (Lumber and Sawmill Workers, Local Union No. 2611, AFL-CIO) have for many years been parties to successive collective bargaining agreements usually negotiated in their behalf by their respective agents, the Willamette Valley Lumber Operators Association, hereafter called the Operators Association, and the Willamette Valley District Council of the Lumber and Sawmill Workers, hereafter called the District Council (R. 102; 251-253, 259-263).² On May 8, 1953, respondent and

² The Operators Association is a non-profit Oregon corporation which limits its membership to employers engaged in a forest products industry. From time to time, Associa-

the Union entered into a revision of their collective bargaining agreement. The revised agreement contained, *inter alia*, a 75-day modification and termination clause, and a 15-day wage-reopening clause (R. 102, 105-106; 37). These clauses, Article XIII and Article VIII, read as follows (R. 38, 40):

Article XIII:

This agreement terminates on 1 April 1954, but shall automatically extend from year to year unless either party hereto shall have given written notice to the other party at least seventy-five (75) days preceding April 1 of any year of its intention to modify, revise, adjust, or terminate this agreement, specifying in such notice the provisions that it desires to modify, revise, or adjust, or its desire for termination.

Upon the receipt of such notice the other party shall thereupon and not less than sixty (60) days prior to April 1 of that year, offer any proposals it may have for modification, revision, adjustment, or termination of this agreement.

Article VIII:

Wages shall continue subject to the right of either party to request a general wage change by giving the other party written notice of its desire for such general wage change. Negotiations shall commence within fifteen (15) days from the date the notice is received.

tion members, as respondent here, have delegated limited authority to an Association Committee to negotiate with the bargaining representatives of employees of such members. The District Council is an association of labor organizations chartered by the United Brotherhood of Carpenters and Joiners of America, and includes the Union here (R. 106-107; 19, 251).

On February 10, 1954, the District Council, acting as agent for the Union (R. 108-109; 55, 269) and pursuant to Article VIII, notified respondent, as well as a number of other lumber companies under contract with constituent locals of the District Council, that it wished "to open negotiations for an increase of wages for all of your employees who are represented by our union" (R. 109-110; 41, 251). Respondent replied on February 20 questioning the District Council's representative status, and the Union advised respondent by letter dated March 10 that the District Council was authorized to "open and negotiate" wage issues in its behalf (R. 110; 42-43). Respondent made no reply to the March 10 letter and on April 9, the District Council repeated its request for the opening of wage negotiations (R. 110-111; 44). Finally, on April 13 respondent notified the District Council that it had authorized the Operators Association to represent, but not to bind, respondent in such negotiations (R. 111-112; 45).

Thereafter, on April 28, the District Council and the Operators Association began industry-wide negotiations respecting the wage demands of lumber company employees in the Pacific Northwest (R. 112-113; 20, 273-275). While as a result of these negotiations, some employer-members of the Association reached agreement with the District Council on this issue, respondent and other employers did not (*ibid.*). On June 20 the District Council made a direct request to respondent for a wage offer but respondent rejected the request (R. 116; 271). On the following day the Union, pursuant to a strike vote, called a

strike of respondent's employees (R. 116-117; 20, 27-28).³ On June 28, one week after the strike began, Howden, business agent of the Union, advised respondent that he would be willing to transmit a wage offer by respondent to the District Council. President Giustina replied that there would be no offer except that respondent was willing to resume operations on the basis of wages and working conditions in effect when the strike began (R. 117-118; 288-289, 309).

B. Respondent actively participates in a back-to-work movement and threatens to discharge employees who fail to abandon the strike

During the latter part of July discussions took place among some of the strikers concerning the desirability of revoking the District Council's authority to represent the Union in wage negotiations. On or about July 24, Robertson, Winey, and a group of other employees asked the Union's president to call a union meeting in that regard (R. 118-119; 20, 94-95). Such a meeting was held on the night of July 28, but the Union's grant of authority to the District Council was not withdrawn (R. 119; 20-21).

Immediately after the union meeting, however, a group of employees gathered outside the union hall to discuss the possibility of a return to work (R. 119; 21). During this discussion a suggestion was made that the group adjourn to the parking lot at respondent's plant (*ibid.*). When the employees reached

³ Strikes occurred also at other plants still engaged in the wage dispute (R. 117; 274-275).

the parking lot at about 9:30 or 10:00 o'clock, they found that the doors of respondent's machine shop were open and that some benches had been arranged to accommodate an audience (R. 119-120, 155; 21, 291). The group utilized these facilities for a meeting⁸(*ibid.*).

The machine shop meeting, as the open doors and the arrangement of the benches suggest, was not impromptu. Earlier that evening Employee Robertson had called Sam Hughes, respondent's labor relations director, to invite him to a meeting of employees to be held at the plant "shop" later that night (R. 120; 156; 304-310). Hughes interposed no objection and asked whether he might bring along someone else. Receiving an affirmative reply, Hughes asked Natale and Ehrman Giustina, respondent's president and production manager respectively, to come along (R. 121; 21, 256-257, 310-311). Among those present at the meeting also were four employees who had earlier been invited by Employee Johnson to attend a "secret" meeting at the machine shop (R. 122-123, 154-155; 277-283).

Employee Robertson opened the meeting, stating that those present knew why they were there and that he had invited "the bosses" to answer questions.⁴ Hughes and the two Giustinas thereupon joined the assembly. Hughes took charge and inquired whether everyone present had been invited. When Robertson remarked that a few employees were present "who should not

⁴ The facts relating to the machine shop meeting derive, unless otherwise noted, from a stipulation entered into by the parties at the hearing (R. 121-134, 154-163; 21-33).

be present," respondent's representatives conferred with Robertson. Hughes thereafter specifically asked the four Johnson invitees whether they had been asked to come and learned that Johnson had invited them. In response to further questions, Hughes was told further that no general invitation had been issued but that Union Business Agent Howden could have been present if he had wished to attend.

Hughes then asked the men whether they had anything to say. Receiving no response, Hughes began an extensive discourse during which he expressed the hope that none of those present would risk being called "rats" by informing "to the hotshots," and stated "Now if any of you want to leave I'm sure it will be satisfactory to everyone else. Well, I'm sure I don't need to tell you what will happen to you in the future." When no one responded to this suggestion Hughes said, "Very well, we will assume everyone here feels as you do."

In the course of his ensuing remarks Hughes, after disclaiming any intention to "knock" or "break" the Union, stressed that the Union leaders, having the power "to dictate the lives" of several thousand men, should exercise their power responsibly. In that connection Hughes described the strike as "entirely uncalled for"; stressed the cost of the strike to the employees; pointed out that respondent could have lowered wages, and then settled for a fictitious increase; argued that respondent's current wage policy was desirable because of the "steady work" provided by respondent; and advised that the men had a right to refrain from striking. In answer to a question by one of the employees concerning the Union's strike

vote, Hughes stated that he did not "have much respect" for such a vote and refused to believe that it represented the "wishes and desires" of the entire unit represented by the Union.

President Giustina then addressed the employees. He made clear that upon resumption of operations, respondent would maintain the same wages, hours and working conditions and that while he preferred to pay and assign work to the men solely on the basis of ability without regard to seniority, the Union prevented this by trying "to make [them] all the same like sheep." He stated further that he would resist any refusal by strikers to work with those who had earlier abandoned the strike, and that so long as their dues were paid, returning strikers were protected from Union attempts to have them discharged. In reply to an inquiry as to why the District Council did not wish the men to return to work, Hughes said that the members of the Council were interested only in their own jobs and in the money they collected from the employees. President Giustina agreed that the employees would be well advised to be just as concerned about their own jobs.

At this point in the discussion, an employee raised the question whether those employees present could withdraw from the District Council or perhaps form a new union. Hughes interposed that "This is not the time nor the place to discuss anything like that." When a further suggestion was made that the men "get this started," Hughes and the two Giustinas withdrew, and Robertson called for a show of hands from those who wished to return to work, advising

Johnson and his four invitees to leave if they were unwilling to return to work as yet. A majority voted to return to work the next morning. Hughes and the two Giustinas were invited back to the meeting, were advised of the vote, and agreed to restore the men to work the following morning.

The following day, July 29, a sufficient number of strikers returned to work to warrant resumption of operations (R. 134; 33). On August 5, respondent sent to each employee still on strike a letter stating that if he did not return to work by August 9, "it will be considered that you have severed your employment and we will look to others to fill the jobs" (R. 134; 8-9, 33-34, 249-250). At a meeting held on August 8 the majority of the remaining strikers voted to return to work only as a group under the sponsorship of the Union (R. 134; 271-272).

C. Respondent rejects the Union's request to bargain respecting a settlement of the strike, and repudiates its contract with the Union

On August 25, a petition for decertification of the Union as bargaining representative of respondent's employees was filed with the Board (R. 135; 34, 52).⁵

⁵ The petition was prepared by a group of employees which included Winey, one of those who along with Robertson had sought to oust the District Council (*supra*, p. 5). The Board's Regional Director on December 6, 1954, dismissed the petition on the ground that "the collective bargaining agreement currently in effect between the company and Local 2611 of the Lumber and Sawmill Workers Union, AFL, constitutes a bar to investigation of representatives at this time" (R. 135, 138-139; 34, 46). Thereafter, on March 8, 1955, the Board rejected a request for review of this dismissal, holding, consistent with settled practice, that it would not

On August 26, after consultation with the Governors of Oregon and Washington, representatives of the companies and unions involved in the industry-wide strike agreed upon a settlement procedure which provided for termination of the strike and appointment of a Fact Finding Board to investigate and report upon the disputed issues (R. 135-136; 34, 48).

On August 31, the Union presented a copy of the Governors' Proposal to respondent as a basis for a settlement of the strike (R. 137; 34-35). Respondent, however, refused to negotiate with the Union on the ground that the petition for decertification had put the Union's majority status in issue (R. 137; 35). Union Business Agent Howden then asked whether respondent would negotiate with the Union if its status as exclusive bargaining representative were clear, and received an affirmative reply (R. 137; 36). On September 2, however, respondent advised the Union by letter that their collective bargaining agreement "is terminated" (R. 138; 36, 50). The Union responded on September 13th that the agreement could be terminated only under Article XIII which provided for 75 days' notice (R. 138; 54).

D. Respondent offers the Union a wage increase but refuses to discuss its unfair labor practices.

On December 22, the Governors' Fact Finding Board recommended the adoption of a wage increase of 7½ cents an hour by the employers involved in

entertain the petition in view of the issuance of a complaint alleging unfair labor practices by respondent (R. 152; 34).

the industry-wide dispute (R. 139; 58, 60). On January 8, 1955, at respondent's suggestion, representatives of respondent, the District Council, and the Union met to discuss certain "new matters" which had developed since the August 31 conference at which respondent cited the decertification petition as ground for refusing to deal with the Union.⁶

Respondent made clear at the outset that it was not waiving any question of representation raised by the decertification petition, but advised that it was willing to put into effect the 7½-cent increase which the other employers in the lumber industry had adopted.⁷ District Council Secretary Kraal and Union Representative Howden pointed out that there were "some other disputes" between respondent and the Union resulting from the fact that respondent had "[c]ommitted unfair labor practices." In this connection the Union cited, *inter alia*, respondent's renunciation of the bargaining agreement with the Union, its earlier refusal to negotiate with the Union, and its insistence that all the strikers had been replaced and were no longer employees of the company. The Union took the position that resolution of the wage issue alone could not be the basis for

⁶ As in the case of the July 28 machine shop meeting, the facts relating to the January 8 meeting derive from a stipulation of the parties (R. 140-150, 175; 60, 62, 63-64, 65, 72-75, 79, 80-81, 82-83, 85).

⁷ Except for respondent, all the employers still involved in the industry-wide dispute entered into settlement agreements on the basis of the Fact Finding Board's recommendations, and the strike was called off as to them (R. 174-175; 274-275).

settlement of the strike unless respondent was also willing to discuss the "other matters." The meeting ended on this note.

E. The strike is terminated, but respondent rejects the strikers' unconditional application for reinstatement

On January 13, 1955 respondent by letter reaffirmed its notice of September 2, 1954, terminating its agreement with the Union (R. 150; 15). The Union's reply on January 18 reiterated its earlier position, expressed September 13, that since the agreement had not been terminated on 75 days' notice, it was still in effect (R. 150; 16).

On January 19, the Union formally terminated its strike, notified respondent to that effect and unconditionally requested reinstatement of the strikers (R. 150-151; 36, 50-51). The strikers themselves sent respondent two letters to the same effect (R. 151; 36). Respondent replied by letter dated January 22 that there were no "vacancies" at its plant (R. 151; 36, 51).

II. The Board's Conclusions of Law

The Board found that respondent by the foregoing course of conduct interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act, defaulted on its statutory bargaining obligation in violation of Section 8 (a) (5), and discriminatorily denied reinstatement to strikers in violation of Section 8 (a) (3). Specifically, the Board found that respondent had violated Section 8 (a) (1) and (5) of the Act by knowingly acquiescing in the

use of its premises for the promotion of a back-to-work movement; by actively participating in that movement;⁸ by making a direct appeal to the employees to abandon the Union and the strike and to accept respondent's offer, rejected by the Union, to maintain existing wages and working conditions; by threatening the strikers with loss of employment if they did not abandon the strike; by refusing to negotiate with the Union; and by repudiating its contract with the Union (R. 214-216, 152-190, 195-196). The Board predicated its finding of a Section 8 (a) (3) violation on the premise that respondent by its unfair labor practices had converted what was originally an economic strike for higher wages into an unfair labor practice strike, that the strikers were thereby entitled to reinstatement upon application, and that respondent's rejection of their application for reinstatement constituted discrimination violative of the Act (R. 173-176, 186-187). In making the foregoing findings, the Board rejected various defenses which were advanced by respondent and which are discussed *infra*, pp. 20-27.⁹ On September 26, 1956, the Board denied respondent's motion for reconsideration (R. 239-240).

⁸ Chairman Leedom was of the view that respondent's participation in the employees' back-to-work meeting warranted an unfair labor practice finding and made it unnecessary to decide whether respondent also unlawfully participated in prearranging that meeting (R. 215, n. 2).

⁹ One Board member took the view that a Section 8 (d) defense discussed below, pp. 31-37, was valid and warranted dismissal of the entire proceeding (R. 219-225).

III. The Board's Order

The Board ordered respondent to cease and desist from the several unfair labor practices found and from in any other manner interfering with, restraining and coercing its employees in the exercise of their statutory rights.¹⁰ The affirmative provisions of the Board order contained, in addition to the usual notice-posting provisions, a directive that respondent bargain collectively with the Union upon request, that it reinstate and make whole the employees who were on strike on January 19, 1955, the date of their request for reinstatement, and to the extent that insufficient jobs were available, that it place the remaining strikers on a preferential hiring list. In this connection the Board directed that respondent dismiss, if necessary, persons hired on or after July 28, 1954, when—because of respondent's unlawful conduct—the strike became an unfair labor practice strike (R. 216-219, 225-228).

SUMMARY OF ARGUMENT

I. Substantial evidence supports the Board's finding that respondent engaged in a pattern of conduct constituting interference with, and restraint and co-

¹⁰ The Board found that "the unfair labor practices attributable to the Respondent disclose an attitude of opposition to the statute's purposes with respect to the protection of employee rights in general; they are closely related to the other unfair labor practices proscribed by the Act, as amended, and a danger of their commission in the future is to be anticipated from the conduct of the Respondent in the past" (R. 194). Under these circumstances, a broad cease-and-desist order is plainly appropriate. *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 436-437.

ercion of its employees in violation of Section 8 (a) (1) and a refusal to bargain in violation of Section 8 (a) (5). Respondent's participation in the "back to work" meeting of July 28, 1954, in which it dealt directly with the employees in derogation of the Union which was their bargaining representative, independently supports such a finding. Respondent's letter of August 5, 1954, informing the strikers that their employment would be terminated unless they abandoned the strike amounted under all the circumstances to an unlawful threat of discharge. Finally, respondent on August 31, 1954, rejected flatly the Union's offer to negotiate a strike settlement and subsequently on September 2, 1954, repudiated its contract with the Union altogether.

Respondent's several defenses for its admitted refusal to bargain with the Union are devoid of merit. The filing of a petition for decertification of the Union as bargaining representative of the employees afforded respondent no warrant for evading its bargaining obligation. Respondent either knew, or is chargeable with knowledge, that its subsisting collective bargaining contract with the Union barred consideration of the petition for decertification. Nor could respondent escape liability for its August 31 refusal to negotiate on the ground that the Union itself attended that meeting with a "closed mind." In the first place, respondent's claim in that regard was patently an afterthought. In the second place, respondent summarily refused to negotiate because of the pending petition for decertification and never gave the Union an opportunity to state its position.

Finally, respondent's claim that the bargaining unit of its employees was inappropriate and that the bargaining obligation was expunged is both lacking in substance and foreclosed by respondent's stipulation that the unit was appropriate.

Respondent's abrupt repudiation of its contract with the Union on September 2, 1954, was not excused by the claim that the Union had already violated the contract by striking in disregard of the grievance procedure set forth in the contract. Substantial evidence supports the Board's finding that the alleged breach was not respondent's true reason for repudiating the contract. In addition, respondent has failed to establish its claim that the strike was a breach of the contract.

II. Substantial evidence likewise supports the Board's finding that the economic strike of the employees was prolonged by respondent's unfair labor practices. Accordingly, respondent's refusal to comply with the strikers' unconditional application for reinstatement constituted unlawful discrimination within the meaning of Section 8 (a) (3) of the Act. The record also supports the Board's finding that respondent abandoned before the Board any issue relating to the validity of the strike under Section 8 (d) of the Act.

ARGUMENT

I. The Board Properly Concluded That Respondent Violated Section 8 (a) (1) and (5) of the Act

A. *Substantial evidence supports the Board's finding that respondent dealt directly with its employees in derogation of the Union's status as exclusive bargaining representative of those employees*

The evidence (*supra*, pp. 5-7) amply supports the Board's finding (R. 154-156) that respondent had advance notice that the machine shop meeting late on the night of July 28 was for the purpose of furthering a back-to-work movement by some of the strikers and that it acquiesced in the use of its premises for such a meeting. The ostensibly spontaneous character of the meeting was belied by the fact that Employee Johnson had earlier that evening invited four fellow-employees to attend it. Moreover, no credible explanation is advanced to explain the unusual circumstance that the machine shop was left open at that late hour, and the even more unusual circumstance that some of the benches had been arranged to accommodate an audience. It is unlikely that such preparations were made without respondent's knowledge and acquiescence, especially since it was customary—even when no strike was going on and normal conditions prevailed—to obtain permission to use the shop for employee meetings which did not involve company business (R. 155-156; 21, 257-259, 295). Finally, further evidence that respondent had advance notice of the machine shop gathering is that Labor Relations Director Hughes knew at the very outset of the meeting and with no announcement being made to that effect that the employees had

gathered to discuss the question of abandoning the strike and returning to work. In the light of this record the Board was plainly warranted in finding that respondent had, at the very least, acquiesced in the use of its premises for furthering a back-to-work movement.

Quite apart from respondent's conduct in this regard, however, respondent's participation in the "back-to-work" meeting independently supports the Board's finding of unlawful interference and refusal to bargain. The record establishes that Labor Relations Director Hughes appealed to the employees to abandon the strike and sought to deal directly with the employees rather than with the Union, their exclusive bargaining representative. Thus, Hughes, together with President Giustina, described the strike as "entirely uncalled for," pointed out that the men had a right to refrain from striking, disparaged the representative character of the strike vote and the Union's motives, stated the wages and other terms of employment which would be offered the men if they resumed work (the Union had rejected such an offer), and in effect suggested that unless they accepted such wages and terms, they could not be assured of steady work (*supra*, pp. 7-8). Contrary to respondent's claim, such conduct did not constitute an exercise of free speech but was "a well-settled violation of Section 8 (a) (1) of the Act." *N.L.R.B. v. Montgomery Ward & Co.*, 133 F. 2d 676, 681 (C.A. 9), certiorari denied, 312 U.S. 678; *N.L.R.B. v. Sunshine Mining Co.*, 110 F. 2d 780, 790 (C.A. 9); *N.L.R.B. v. Wooster Division of*

Borg-Warner, 236 F. 2d 898, 905, (C.A. 6), certiorari denied on this issue, 353 U.S. 907; *N.L.R.B. v. Clearfield Cheese Co.*, 213 F. 2d 70, 73 (C.A. 6). Moreover, this conduct included direct dealing with the employees in derogation of the bargaining obligation which the Act imposes. See, in addition to the cases already cited, *Medo Photo Corp. v. N.L.R.B.*, 321 U.S. 678, 683, 684; *N.L.R.B. v. Biles-Coleman Lumber Co.*, 98 F. 2d 18, 22 (C.A. 9).

B. *Substantial evidence supports the Board's finding that the purpose and effect of respondent's letter of August 5, 1954, were to threaten the strikers with discharge*

The record (*supra*, p. 9) also affords adequate basis for the Board's finding (R. 163-167) that respondent's August 5 letter—informing each employee still on strike that he would be regarded as having severed his employment if he did not return to work by August 9—was an effort to bring about an abandonment of the strike through threat of discharge and hence was a further violation of Section 8 (a) (1) of the Act. *N.L.R.B. v. Leach & Wallace*, 234 F. 2d 400 (C.A. 3); *N.L.R.B. v. Beaver Meadow Creamery*, 215 F. 2d 247, 252-253 (C.A. 3); *N.L.R.B. v. United States Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 813, and cases there cited. Respondent's contention that the letter was merely a statement of respondent's right and intention to replace economic strikers falls for two reasons. First, as more fully explained in Point II of the Argument, respondent's unlawful conduct at the July 28 meeting had converted the economic strike into an unfair labor practice strike, thereby

vitiating respondent's normal right of replacement. *N.L.R.B. v. Lettie Lee, Inc.*, 140 F. 2d 243, 249 (C.A. 9); *N.L.R.B. v. Pecheur Lozenge Co.*, 209 F. 2d 393, 404-405 (C.A. 2), certiorari denied, 347 U.S. 953. Second, even assuming that the employees involved were still economic strikers, respondent's August 5 letter could not be regarded as a mere statement of respondent's legal rights where, as here, it followed on the heels of its unlawful participation in a back-to-work movement and its unlawful attempt to bypass the majority representative of the employees. In such a context, it is apparent, as the Board found, that the letter was in fact, and was intended as, a threat of discharge to induce the strikers to abandon the strike. See *Leach and Wallace, Beaver Meadow*, and *United States Cold Storage* cases, *supra*. *Kansas Milling v. N.L.R.B.*, 185 F. 2d 413 (C.A. 10), upon which respondent relies, lacked this context and is plainly distinguishable. Cf. *Associated Wholesale Grocers of Dallas, Inc.*, 119 NLRB No. 9, with *Kerrigan Iron Works*, 108 NLRB 933, 935-936, affirmed *sub nom Shopmen's Local Union No. 733 etc. v. N.L.R.B.*, 219 F. 2d 874, 875-876 (C.A. 6).

C. *The Board properly rejected respondent's several defenses to its direct refusal to bargain with the Union at the meeting of August 31, 1954*

Respondent's flat rejection on August 31, 1954, of the Union's request to discuss a possible settlement of the strike constituted a further violation of its statutory bargaining obligation. In an attempt to justify this action, respondent asserted three defenses before the Board, each of which we shall show is without merit.

1. *The Midwest Piping defense*

Respondent asserts that it was exonerated from its bargaining obligation on August 31 because several days earlier it had been advised that a petition for decertification of the Union as bargaining representative of the employees had been filed with the Board and that the Union's representative status was therefore in doubt. Respondent, in short, seeks to invoke the Board's *Midwest Piping*¹¹ rule, namely, that an employer must remain neutral when rival claims raise before the Board a question concerning the representation of his employees.

The *Midwest Piping* rule "is a direct outgrowth of the parent doctrine of employer neutrality in matters relating to employees' choice of a bargaining representative. It has long been established that where employees are confronted with a choice of bargaining representatives, the employer may not accord such treatment to one of the rivals as will give it an improper advantage or disadvantage in its contest for the employees' favor [citing cases]." *N.L.R.B. v. National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2). On the other hand, as this Court observed in *N.L.R.B. v. Flotill Products, Inc.*, 180 F. 2d 441, 444, industrial peace, the prime objective of the rule in the first instance, will not be achieved by its "indiscriminate application." See also *N.L.R.B. v. Standard Steel Spring Co.*, 180 F. 2d 942 (C.A. 6). Accordingly, as the Board pointed out in the instant case (R. 167-168), a limitation on the rule is that

¹¹ *Midwest Piping Supply Company, Inc.*, 63 NLRB 1060.

the question of representation must be “real,” and where one of the rival claims is “clearly unsupportable or specious,” the rule does not apply. In such a situation, an employer would not be required, for example, to refrain from bargaining with an incumbent union. *Wm. Penn Broadcasting Company*, 93 NLRB 1104, 1105; *Wm. D. Gibson Co.*, 110 NLRB 660, 662.

The considerations applicable to situations where, upon a petition for certification, rival claims are involved are applicable also to situations where a petition for decertification is filed. An unsupportable or specious petition for decertification, like a baseless rival claim, should not enable an employer to disregard his otherwise unquestioned “legal duty to bargain with [the Union] in the same manner as it had done in the past.” *Flotill, supra*, 180 F. 2d at 444; cf. *Brooks v. N.L.R.B.*, 348 U.S. 96, 103.

Applying the foregoing principles to the instant case, the Board found (R. 168) that the petition for decertification was unsupportable and did not raise a “real” question concerning representation so as to relieve respondent of its statutory duty to continue bargaining with the Union. Specifically, the Board noted (R. 170) respondent’s awareness of “the fact that its contract with the Union had been renewed automatically earlier in the year . . . and that it was . . . in full force and effect when the decertification petition was filed.”¹² Accordingly, as the Board

¹² The record fully supports this finding. Thus, prior to August 25, 1954, when the petition was filed (*supra*, p. 9),

further noted (R. 169-171), under the Board's well-established "contract bar" rule,¹³ consideration of the petition for decertification was barred (*supra*, n. 5).

neither the Union nor respondent served a 75-day notice of intention to terminate the contract under Article XIII thereof (R. 40; 267-268). The only notice given was the Union's 15-day wage reopening letter of February 10, 1954 pursuant to Article VIII of the contract (R. 41, 268). Moreover, the petition for decertification, which was received by respondent on August 27, 1954 (R. 135; 259) put respondent on notice of "the existence of the contract as a current commitment of the firm" (R. 170), since it cited April 1, 1955 as the expiration date of the contract (R. 135; 53). Finally, respondent itself recognized the continued existence of the contract since it contended at page 43 of its brief to the Board (a certified copy of which has been lodged with the clerk of this Court) that the Union had broken the contract by its strike of June 21, 1954, thereby tacitly admitting that the contract continued in effect despite the Union's February 10 notice. Respondent further contended before the Board (*id.*, p. 44) that even if the Union had not broken the contract, that notice "prevented the automatic renewal of the agreement" on April 1, 1954, its terminal date; that the notice converted the contract into "one for an indefinite period of time, subject to termination by giving reasonable notice of termination," i.e., "sixty days"; and that when respondent gave such notice on September 2, 1954 (*supra*, p. 10), "termination became effective sixty days later." Thus, even under respondent's reasoning, it is clear that respondent was aware of the existence of the contract as of August 25, 1954, when the decertification petition was filed.

¹³ The "contract bar" rule, referred to by this Court in *N.L.R.B. v. J. I. Case Co.*, 201 F. 2d 597, 600, has been applied by the Board since the early days of the Wagner Act. See *National Sugar Refining Co.*, 10 NLRB 1410, 1415. Under this rule, subject to limitations not relevant here, petitions for certification or decertification are barred from consideration if a valid collective bargaining agreement covering the employees in issue is in effect at the time the petition is filed. *Snow & Neally Co.*, 76 NLRB 390, 391.

Respondent may not evade liability for its conduct in this regard by professing ignorance of these controlling principles. The normal presumption that persons are chargeable with knowledge of statutes and administrative regulations (*Wilber National Bank of Oneonta v. United States*, 294 U.S. 120, 124; *Hotch v. United States*, 212 F. 2d 280, 284 (C.A. 9)) is equally applicable here where the controlling principles of law have long been established in Board determinations. Cf. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 202.¹⁴

2. *The defense that the Union attended the August 31 meeting with a "closed mind"*

A second defense asserted by respondent for its refusal to negotiate with the Union respecting a strike settlement on August 31, 1954, was that the Union representatives attended the meeting with closed minds, i.e., that they intended merely to obtain respondent's signature to an agreement incorporating the Governors' proposal, and had no intention to bargain. As the Board pointed out, however (R. 171), the record shows that respondent rejected the Union's request for negotiations for a wholly different reason, i.e., the filing of the petition for decertification (R. 35, 293-294, 302-303, 304). Respondent first asserted its claim of Union intransigence only after Union Business Agent Howden testified at

¹⁴ In this connection it may be noted that respondent's labor relations director was admittedly "a licensed lawyer well qualified in the specialized field of labor law" (Respondent's brief to the Board, p. 44, *supra*, n. 12).

the hearing before the Trial Examiner that when the District Council received copies of the Governors' proposal on August 27, the Union representatives "were told to go and secure the signatures of the operators on that" (R. 273). It is apparent, therefore, as the Board found (R. 171) that the defense here asserted is a mere afterthought and that respondent's refusal to negotiate a strike settlement was not motivated by any good faith belief that negotiation would be fruitless.

Moreover, the defense is without basis on its merits. Respondent stipulated that Howden said at the meeting, "we want to talk about the Governor's paper" (R. 35). Had respondent complied with its statutory duty to bargain, it might have found that the Union intended to use the Governors' recommendation as a basis for discussion rather than to adopt a "take-it-or leave it" attitude. Respondent failed, however, to give the Union an opportunity to state its position and summarily refused to negotiate because of the pending petition for decertification (R. 35-36). Under these circumstances substantial evidence supports the Board's conclusion (R. 171-172) that the situation "never reached the point, argued by counsel, at which it *could* have been determined that the Union's position was actually inflexible" [italics in original].

3. *The "appropriate unit" defense*

Respondent's third and final defense on this phase of the case, advanced for the first time in its motion for reconsideration (*N.L.R.B. v. Pinkerton's Na-*

tional Detective Agency, Inc., 202 F. 2d 230, 233 (C.A. 9)), was that it had no duty to bargain with the Union in any event because respondent's employees did not constitute an appropriate unit (R. 237-239). Respondent relied in this regard on language from Board decisions in *Jones & Anderson Logging Co., Inc.*, 114 NLRB 1203, and *Miller Shingle Co.*, 114 NLRB 1217, to the effect that employers in the lumber industry in the Northwest, participating in industry-wide negotiations, would constitute a multi-employer unit.¹⁵ Respondent argues from this language that since the negotiations here were part of a larger series of industry-wide negotiations over the wage issue in the Pacific Northwest, only a multi-employer unit was appropriate.

The short of the matter is that the language and holdings of the cited cases with reference to appropriate units turn on the particular facts there under consideration and the different facts in the present record make the cited cases of little aid here. Moreover, the instant record establishes conclusively that respondent's employees constitute an appropriate unit within the plain intendment of Section 9(b) of the Act. Thus, the parties expressly stipulated before the Board that the unit here in issue, the identical one covered by the contract, "is now and at all times material herein was an appropriate unit" for purposes of collective bargaining (R. 18). In this state of the record, respondent's belated objections respect-

¹⁵ The actual holdings of the cited cases were that the particular employers involved were not part of a multi-employer unit.

ing the unit represented by the Union were properly rejected by the Board.

D. *The Board properly concluded that respondent's repudiation of its contract with the Union was unlawful*

As shown in the Statement, p. 10, respondent in a letter dated September 2, 1954, notified the Union that their collective bargaining agreement "is terminated." Respondent in its letter did not cite any reason for the termination, and the contract contained no provision covering such action except for the provisions of Article XIII which were plainly inapplicable (see text of provisions, *supra*, p. 3), and which respondent did not even purport to invoke. Accordingly, the Board properly concluded (R. 173) that respondent "terminated its agreement with the Union in a further effort to justify its refusal to negotiate with that organization in regard to a strike settlement."

Respondent's repudiation of its agreement and of its bargaining relationship with the Union plainly violates the bargaining obligation (see *N.L.R.B. v. Shannon & Simpson Casket Co.*, 208 F. 2d 545, 548 (C.A. 9)) and likewise constitutes unlawful interference, restraint and coercion within the meaning of Section 8 (a) (1). *N.L.R.B. v. Biles Coleman Lumber Co.*, 98 F. 2d 18, 22-23 (C.A. 9). Especially in view of respondent's prior unlawful conduct, the Board could fairly conclude, as it did (R. 173), that the abrupt termination "was reasonably calculated to impair the Union's position as the exclusive bar-

gaining representative of the firm's employees, and that it could be expected at the very least to persuade them, whether strikers or strikebreakers, that the Union had lost its influence as their bargaining agent."

Respondent before the Board sought to justify its termination of the contract by asserting that the Union had theretofore broken the contract by calling a strike without resorting to the contract grievance procedure. This proffered defense is without substance. The fact of the matter is, as the Board found (R. 179), that the Union's alleged breach of contract was not at all the real reason for respondent's action but a mere "afterthought," never advanced until after the instant proceeding was initiated. Prior thereto, the only reason assigned by respondent for rejecting the Union was the pending petition for decertification (R. 137, 171, 178; 35, 293-294, 302-303, 304).

Under these circumstances it is almost superfluous to note that respondent, having advanced the Union's alleged breach of contract as an affirmative defense, failed to establish that defense, as the Board found (R. 179-182). Article IX of the contract (R. 38-40) concededly prohibits strikes and lockouts pending exhaustion of the grievance procedures outlined in Article II, and such grievance procedures are made applicable to "all complaints arising out of this collective bargaining relationship." However, the terms "complaints" and "grievances" are used interchangeably in Article II and are clearly limited to a "complaint . . . in regard to his [the employee's] individ-

ual working conditions, individual rate of pay, individual promotion, demotion, discharge, lay off, or suspension for cause, arising under the terms of this agreement and such complaint not having been disposed of by the immediate supervisor of the employee concerned to the satisfaction of the employee" (R. 102-103, 180).¹⁶ The quoted language clearly does not contemplate that a general wage dispute—the cause of the strike herein—should constitute a grievance or be subject to grievance procedures. Indeed, the procedure to handle general wage disputes is outlined in a separate section of the contract, namely Article VIII (*supra*, p. 3). Moreover, the parties have uniformly regarded general wage disputes as falling outside the purview of the grievance procedures, and general wage negotiations under Article VIII have traditionally been conducted on behalf of the parties by the District Council and by the Operators Association (*supra*, pp. 2, 4).

II. The Board Properly Concluded That Respondent's Refusal To Reinstate the Strikers Violated Section 8 (a) (3) and (1) of the Act

A. *Substantial evidence supports the Board's finding that the strike was prolonged by respondent's unfair labor practices*

During the conference of January 8, 1955, at which respondent offered a wage increase of 7½ cents per hour, both the Union and its negotiating

¹⁶ The text of Article II is contained in G.C. Ex. 2, App. A, which because of its length was omitted from the printed transcript of Record.

agent, the District Council, informed respondent that the wage increase, which had been recommended by the Governor's Fact Finding Panel as a basis for strike settlement, could be discussed only if respondent also discussed its unfair labor practices (*supra*, p. 10-12). This circumstance, undisputed on the record, points up the validity of the Board's finding (R. 173-176) that the strike which had begun merely as an economic strike in support of a wage demand was converted and prolonged by respondent's subsequent unfair labor practices into an unfair labor practice strike. Viewed against respondent's participation in the back-to-work meeting on July 28, its letter of August 5 threatening the strikers with discharge unless they returned to work, its direct refusal to bargain with the Union on August 31, and its repudiation of the collective bargaining agreement two days later, the propriety of the Board's finding is manifest. *N.L.R.B. v. Lettie Lee, Inc.*, 140 F. 2d 243, 249 (C.A. 9); *N.L.R.B. v. Pecheur Lozenge Co.*, 209 F. 2d 393, 404-405 (C.A. 2), certiorari denied, 347 U.S. 953, and cases cited. The strikers thereupon became unfair labor practice strikers and respondent was obliged to reinstate them upon their unconditional application, discharging, if necessary, replacements hired after it had engaged in unfair labor practices. *Pecheur*, *supra*, and cases cited. Respondent's refusal to comply with the request for reinstatement constituted, as the Board found (R. 186-187, 196), discrimination violative of Section 8 (a) (3) and (1) of the Act. *Mastro Plastics v. N.L.R.B.*,

350 U.S. 270, 278; *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 907-908 (C.A. 9).¹⁷

B. *The Board properly concluded that no Section 8 (d) issue was before it for determination inasmuch as respondent had abandoned any reliance on that Section*

Section 8 (d) of the Act, set forth in full in the Appendix, *infra*, pp. 38-40, provides in substance that no party to a collective bargaining contract shall terminate or modify such contract unless the party desiring such termination or modification (subsection 1) gives a 60-day notice to the other contracting party; (subsection 2) offers to negotiate a new or modified contract; (subsection 3) serves appropriate notice upon federal and state mediation agencies of the existence of a dispute; and (subsection 4) continues the existing contract in full force and effect without resorting to strike or lockout for 60 days or until the expiration date of the contract whichever occurs later. The section further provides that any employee who strikes within the 60-day period shall lose his employee status.

At the outset of the Board proceeding, respondent in its answer to the complaint alleged that the strike was "a breach of the labor agreement" and "con-

¹⁷ Should the Court disagree with the finding that the strike herein was converted to an unfair labor practice strike, the appropriate action would then be to remand the case to the Board for further proceedings to determine which of the strikers had not been replaced so as to entitle them to reinstatement as economic strikers. *Pecheur, supra*, 209 F. 2d at 400; *Kansas Milling v. N.L.R.B.*, 185 F. 2d 413, 420-421 (C.A. 10).

stituted an unfair labor practice within the meaning of the Act" (R. 11). In its brief before the Trial Examiner, p. 23 (a copy of that brief has been lodged with the Clerk), respondent amplified this allegation, asserting that the strike occurred while the contract was in effect, contrary to the statutory requirement that a "party proposing modification continue to work without stoppage for 60 days or termination of the contract, whichever occurs later." Accordingly, respondent urged that it was relieved of its statutory bargaining obligation.

Since respondent's contention was bottomed on the language of subsection 8 (d) (4), the Trial Examiner confined himself to a consideration of the impact of that subsection on the strike called by the Union. He concluded that under existing authority, respondent's contention was "without merit" (R. 182). He noted further (*ibid.*) that respondent had not, prior to the Board proceeding, sought to justify its refusal to bargain on any claim of strike illegality. Indeed, respondent in the cited brief (p. 23) decried the importance of the Section 8 (d) issue and disclaimed any intention "to push this point in more detail."

Upon issuance of the Trial Examiner's Intermediate Report, respondent filed voluminous exceptions (R. 205-214) and a supporting brief before the Board. Only three of the 95 exceptions could be deemed relevant to the issue here involved. These exceptions were (R. 213):

83. To the conclusion that Respondent sought to justify a refusal to bargain upon the existence of a strike * * *

84. To the finding that Respondent dealt with the Union through the Willamette Valley Lumber Operators Association after the strike * * *
85. To the finding that Respondent did not seriously present the issue of an unlawful strike * * *

Respondent's brief in support of its exceptions made merely a passing reference (p. 42) to the *Lion Oil Manufacturing* doctrine.¹⁸ On this state of the record the Board concluded that (R. 215-216):

Insofar as any 8 (d) issue was raised, the Trial Examiner found that it was limited to 8 (d) (4) and concluded that * * * there was no merit to the contention. In its exceptions to the Board, the Respondent did not take issue with the Trial Examiner's so limiting the 8 (d) issue nor with his failure to consider that 8 (d) (1), (2), or (3) were involved in the case. Also the Trial Examiner stated that Respondent sought to justify its refusal to bargain because the employees were on strike. The Respondent excepted to this statement. Necessarily, the Respondent thereby completely negated any reliance upon Section 8 (d) (4). Consequently, we believe that any 8 (d) issue that may have been raised before the Trial Examiner was thereafter aban-

¹⁸ See *Lion Oil Company*, 109 NLRB 680 where the Board set forth its interpretation of the 60-day requirement of Section 8 (d) (4). The Board's order in that case, predicated in part on the rejection of a Section 8 (d) defense, was set aside by the Eighth Circuit. 221 F. 2d 231. On the Board's petition for certiorari, the Supreme Court reversed the Eighth Circuit and remanded the case for further proceedings. 352 U.S. 282.

done by the Respondent and the issue is not now before the Board.¹⁹

Thereafter, the Board issued an order denying respondent's motion for reconsideration on the ground that "contentions raised in respect to Section 8 (d) were previously considered by the Board" (R. 239-240).

We submit that neither respondent's exceptions nor its supporting brief presented to the Board the question whether the strike called by the Union violated Section 8 (d) of the Act. The Board correctly noted that respondent nowhere took issue with the Trial Examiner's failure to address himself to the validity of the strike under subsections 8 (d) (1), (2), and (3) of the Act. Indeed, respondent made no specific reference whatever to these subsections and the record lacks much of the data which would be relevant in that regard. Similarly, respondent's exceptions, to the extent they are relevant at all (*supra*, pp. 32-33), indicate that respondent before the Board disavowed any reliance even upon Subsec-

¹⁹ One Board member disagreed with the holding that the Section 8 (d) defense had been abandoned and concluded that application of the Section 8 (d) provisions to the facts of the instant case would require dismissal of the complaint (R. 219-225). Under the majority view, however, the Board was not required to, and did not rule on the impact of Section 8 (d). Such a ruling would be required only if the Court should conclude that the Board's "abandonment" determination was wrong and remand the matter for agency determination as a prerequisite to judicial review. See *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 20; *N.L.R.B. v. Thayer Co.*, 213 F.2d 748, 755 (C.A. 1), certiorari denied, 348 U.S. 883.

tion 8 (d) (4). Thus exception 83, as the Board noted, disclaimed reliance upon the strike as a basis for the refusal to bargain (R. 182).²⁰ Exception 84, in the context of the finding there challenged (R. 182), may fairly be read as raising only the factual question whether respondent, after the strike, dealt with the Union through the Willamette Valley Lumber Operators Association. Finally, exception 85 raises only the correctness of the Trial Examiner's observation, based on respondent's own statement in its brief, that respondent did not seriously urge the issue of an unlawful strike. Under these circumstances, the Board correctly declined to pass upon any Section 8 (d) issue in its Decision and Order and likewise properly rejected respondent's effort to revive the issue in its motion for reconsideration. *Kovach v. N.L.R.B.* 229 F. 2d 138, 144 (C.A. 7).

The Board's declination to deal with the Section 8 (d) issue was, therefore, a reasonable exercise of its administrative discretion. It is a sound and familiar principle that a judicial tribunal, as well as a quasi-judicial administrative tribunal, may in its discretion

²⁰ In its motion for reconsideration, respondent sought to evade the consequences of this disclaimer by urging that the Board had not read exception 83 as it was intended and that it was really intended to raise the issue of strike illegality. But even on the most generous reading, exception 83 states only what respondent does *not* argue; it omits any statement as to what respondent *does* argue. Respondent cannot in a motion for reconsideration remedy its earlier failure to set forth its Section 8 (d) defense in explicit terms. *N.L.R.B. v. Essex Wire Corp.*, 245 F.2d 589, 591 (C.A. 9); *N.L.R.B. v. Pinkerton's supra*, 202 F. 2d at 233.

decline to deal with issues not pressed before it. See *N.L.R.B. v. Kovach*, *supra*, 229 F. 2d at 143-144; *Amalgamated Meat Cutters v. N.L.R.B.*, 237 F. 2d 20, 27 (C.A. D.C.), certiorari denied, 352 U.S. 1015 (on rehearing); cf. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481, n. 9.

By the same token, no Section 8 (d) issue is presented to this Court for review. Section 10 (e) of the Act provides that "No objection not urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 388; Rules and Regulations of the National Labor Relations Board, Section 102.46 (29 CFR Sec. 102.46). As the Supreme Court has pointed out, the purpose behind the statutory prohibition is to afford the Board an "opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 256. In order to give the Board such an opportunity, objections must be sufficiently explicated to apprise the Board of the nature of the objection. *Id.* at 255. In the instant case respondent's objections not only lacked the explicitness which could so easily be achieved by specific reference to the statutory provisions invoked; they could fairly be read, as the Board did read them, as abandoning any reliance on those provisions. Here, as in *N.L.R.B. v. Pinkerton*, 202 F. 2d 230, 232-233 (C.A. 9), there are no extraordinary circumstances warranting a departure from the salutary principle

of making presentation of an issue to the Board a prerequisite to judicial review.²¹

CONCLUSION

For the foregoing reasons, we respectfully submit that a decree should be issued enforcing the Board's order in full.

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November 1957.

²¹ To the extent that *N.L.R.B. v. Spiewak*, 179 F. 2d 695, 701-702 (C.A. 3), relied upon by respondent, may be read to the contrary, we submit that this Court's view, as set forth in *Pinkerton*, is the correct interpretation of the law here applicable.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collective through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to

wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

“(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

“(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

“(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

“(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * *

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3),

and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

PREVENTION OF UNFAIR LABOR PRACTICES

* * * *

SEC. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act; * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of

the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order; and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *



No. 15,625

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

GIUSTINA BROS. LUMBER CO.,
Respondent.

BRIEF OF RESPONDENT

*On Petition for Enforcement of an Order of the
National Labor Relations Board*

FILED

DEC 12 1957

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United States
COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

GIUSTINA BROS. LUMBER CO.,
Respondent.

BRIEF OF RESPONDENT

*On Petition for Enforcement of an Order of the
National Labor Relations Board*

PRELIMINARY STATEMENT

Respondent fully appreciates the heavy burden assumed by it in attacking the validity of an order of the National Labor Relations Board. The duty of satisfying the statutory obligation that the record as a whole does not support the order is weighty enough, but that burden is made more onerous by the practice of the Trial Examiner in composing a report in which findings are drawn from negatives and omissions; conclusions flow

from comparisons and unanswered questions. Time and again “findings” are not based on identified portions of the record. Refuge is sought in the all encompassing phrase—“from the entire record.” This obscure and masked method of drafting a report, makes almost impossible the task of citing specific portions of the record to refute his “findings.”

In this particular proceeding most of the substantial evidence is stipulated by the parties or is written. We are not confronted with the usual case where weight is to be given to findings because the Trial Examiner had the benefit of observing the witnesses on the stand, their demeanors and attitudes, which ordinarily would help him to find the true facts from conflicting testimony. Under these circumstances we are not concerned with credibility of witnesses or conflicting testimony.

The parties stipulated the record (G.C. Ex. 2, Tr. 16-51): the right to adduce testimony “concerning any further facts material to the issue” (Tr. 36, para. XX). This stipulation is binding as to the matters covered by it, *Shopmen’s Union v. N.L.R.B.*, 219 F.(2d) 874 (C.A. 6, 1955); *H. Hackfeld & Company Limited v. U.S.*, 197 U.S. 442 (1905); *Morey, Adx. v. Redifer*, 204 Ore. 194, 282 P.(2d) 1062; *Crouch v. Central Labor Council*, 134 Ore. 612, 293 P. 729.

Respondent, Giustina Bros. Lumber Co., has operated a sawmill in Eugene, or its vicinity for a good many years. To supply logs to the sawmill it has conducted logging operations in the Eugene, Oregon area. Since at least 1938 its employes in these operations have

been represented by Locals of the Lumber and Sawmill Workers, A.F. of L. In all of that period of time and prior to the 1954 strike Respondent had had but one dispute with the Unions which led to a work stoppage. That was an unauthorized "quickie" strike in 1951. The relationship over the years has been good. The woods employes have been represented by Local 2574 and still were at the time of the hearing (Tr. 285). This history of harmonious relations was not challenged.

Since the material facts are stipulated and they are brief, we see no need to repeat them here. Those pertinent to the issues as we see them will be referred to in the discussion of each issue. A general statement will suffice as a background to a statement of the issue. June 21, 1954 an industry-wide strike occurred in the lumber and plywood industries in Oregon and Washington. Respondent was a party to that strike. The strike continued until after August 26, 1954.

A back to work movement started among the employes of Respondent about July 24th. This culminated in a meeting of about 22 employes of Respondent. Officers of Respondent were invited to the meeting. These men decided to go back to work. Operations of Respondent's sawmill were then resumed. August 5, Respondent wrote a letter to its employes advising that operations had been resumed. On August 26 a formula for the settlement of the strike was worked out under the auspices of the Governors of Oregon and Washington. On the basis of this formula the industry strike was settled although it continued at Respondent's sawmill until January 19, 1955.

August 31, 1954 the Governors' formula was proposed to Respondent. Respondent rejected it.

Prior thereto and on August 25, Winey and associates, employes of Respondent, filed a decertification petition.

The Trial Examiner held that the strike, while initially economic, was converted into an unfair practice strike and was prolonged by Respondent.

SUMMARY OF ARGUMENT

Respondent's participation in the meeting of July 28th did not amount to an unfair practice. Respondent made no threats or promises. Its interest, admittedly selfish, to resume operations was a legal interest it was entitled to foster. Respondent did not bargain with employes or interfere with their rights.

The letter of August 5th was not found to be an unfair letter. Since the conduct of Respondent prior to August 5th did not violate the Act, the Examiner's condemnation of the letter as part of a plan of interference is baseless.

Respondent did not unlawfully refuse to bargain with the agent representing its employes at the meeting of August 31st. Local 2611 was not bargaining in good faith because (1) it had permanently transferred authority to bargain over wages to the District Council; (2) the Council representatives were not prepared to bargain at the meeting; (3) Local 2611 no longer represented Respondent's employes; (4) the pending decerti-

fication petition relieved Respondent of any obligation to bargain.

If Respondent did commit an unfair labor practice before August 31, that act did not prolong the strike to August 31. All strikers had been replaced by August 31st.

Since Local 2611 did not comply with the requirements of Section 8(d), the employes forfeited employment rights when the strike occurred, so absolving Respondent of the charges. Having struck illegally, the Board improperly rewarded the strikers with its order of reinstatement with back pay.

ARGUMENT

The Meeting of July 28th

We have read, reread and read again the part of the Intermediate Report dealing with the meeting of July 28th. We confess our inability to understand the reasoning of the Trial Examiner or the bases for his conclusions. We submit that the Report itself contains the elements which destroy it.

The Trial Examiner started his remarks about the July 28th meeting with this statement (Tr. 154):

“In the light of the entire record, it is true, there would seem to be no justification for a conclusion that the Respondent instigated the back-to-work movement among its employees, or that any of its management representatives sponsored or promoted the assembly which preceded its resumption of plant operations.”

Later he concluded (Tr. 159, 160):

“As the General Counsel has put it, the assembly was not accidental; all of the circumstances compel the inference that it had been prearranged by interested employees and the Respondent’s representatives.”

Again he reports (Tr. 154):

“(The contention of Respondent’s counsel that the firm’s management representatives were invited to the assembly, initially, after it had started, must be rejected as contrary to the record.)”

But the Stipulation of the Record provides (Tr. 21):

“One of said employees suggested that they move the meeting to the parking lot of Respondent. This group of said employees then went to the parking lot of Respondent. When they reached the lot they found that the shop was open. The shop had been used in the past for employee meetings. *The group then went into the shop. Officers of Respondent, President Nat Giustina, Ehrman Giustina, and Sam E. Hughes, were then invited to the meeting and attended part of it. No objection was raised by Respondent to holding the meeting on the property of Respondent.*” (Emphasis added.)

Hughes testified he was called by Robertson sometime after 9:30 P.M. and probably close to 10:00 or 10:15 P.M. He was prepared to go to bed (Tr. 312a). The Trial Examiner found that employees assembled between 9:30 and 10:15 P.M. And, he found that Hughes, who was preparing to go to bed, was on the premises near the shop (Tr. 121).

The parties stipulated “The shop had been used in the past for employee meetings (Tr. 21).” In the face of

this stipulation, the Examiner finds that the use of the shop was a departure from previous practice (Tr. 155).

These contradictions in the Intermediate Report, the refusal of the Trial Examiner to follow the Stipulation, justify, if they do not require, careful consideration of the Report and Record.

Concluding his Report upon this meeting, the Trial Examiner said (Tr. 162):

“The available evidence establishes, however, that the employees present were reminded of their ‘individual’ right to abandon the strike and return to work; that they were urged, upon several grounds, to ‘think’ about their own welfare; and that, upon direct inquiry, they were informed of the wages, hours, and working conditions which would govern their employment. In their totality, I find, the remarks of Hughes and President Giustina amounted to a direct appeal to the employees to accept the Respondent’s final offer—the maintenance of the status quo with respect to all significant aspects of the employment relationship—which the Union’s designated representatives had rejected. This was tantamount to direct dealing with the employees on the wage issue then in dispute.”

The principles of law by which meetings of this type are to be judged are well established. They are well stated in *N.L.R.B. v. Bradley Washfountain Co.*, 192 F.(2d) 144, as follows:

“From 1937 to 1948 Union and Respondent enjoyed unbroken collective bargaining relations under a union shop contract. In 1948 negotiations over Union proposals were unsuccessful. A strike was called. After the strike started, Respondent wrote a letter to the employees indicating it desired to resume operations. The letters were ineffectual. Respondent’s officials called on employees asking if they desired to

return to work. A meeting was arranged with employees. Respondent provided the place. A second meeting was held. Respondent suggested the men proceed to the Union Hall and seek a vote. Respondent then wrote a letter that it would resume operations and did so. A majority of the working employees filed a decertification petition. Respondent thereafter refused to recognize the Union."

These activities were held by the Board to convert the strike into an unfair labor practice strike. Said the Court:

"The cases involving the propriety of an employer's solicitation of individual employees, seem to fall into at least three classes. One involves the situation arising prior to or during the formation of the union or during a conflict between two or more unions for the right to represent the employees. The second arises when employees are on strike caused by prior unfair labor practices of the employer. The third is the situation in the present case, namely, where the employees are out on an economic strike.

"In the first situation it seems clear that the Board and the courts will examine closely the employer's conduct in order to ascertain whether interference or coercion is present.

"Close scrutiny is necessary, for in such situations any employer activity which tends in the least to interfere with or coerce employees in the exercise of their rights is improper.

"The second class also represents situations where the Board and courts keep a jealous eye on the employer's activities. See *N.L.R.B. v. Montgomery Ward & Co.*, 133 F.2d 676 (12 LRRM 508) (CA-9); *M. H. Ritzwoller v. N.L.R.B.*, 114 F.2d 432 (6 LRRM 894) (CA-7). This is necessary, for if unfair labor practices of the employer are the cause of the strike, he must not employ improper

means to break the strike before the wrong is remedied.

"In the third case the Board and Courts face another problem. Communications with employees by an employer are protected under the First Amendment of the Constitution so long as such communications contain no threat of reprisal or promise of benefit. *Thomas v. Collins*, 323 U.S. 516 (15 LRRM 777); *NLRB v. Virginia Electric & Power Co.*, 314 US 469 (9 LRRM 405); *NLRB v. Penokee Veneer Co., et al*, 168 F.2d 868 (22 LRRM 2254) (CA-7). The mandate of the statute is that the employer shall not interfere with or coerce the employees in the exercise of their right to organize and bargain collectively. However, absent a showing of interference or coercion, or a threat of reprisal or promise of benefit, in such situation, the employer is free to say to his employees that he wishes to carry on production and, that, if the employees desire so to do, they may return to work.

"This classification results in no subtle distinction clouding further the field of labor relations. We conceive it to be realistic based on the recognition of two important considerations. The first is that the employer has the economic right to continue operation of his plant. He may go anywhere for his labor supply, so long as he is guilty of no misconduct in his attempt. The second consideration, and perhaps the more important, lies in the fact that employees, striking for economic reasons, may be replaced and, if, at the conclusion of the strike, positions of employment are no longer available the employer is under no duty to rehire them.

"In situations such as the one before us, we think the employer may communicate directly to his striking employees the working conditions he is willing to extend to them; and that, if in the exercise of free choice the employees return to work, no charge of misconduct may properly be levied against him. If the communications are fair in their

description of the situation and they do not offer the return employees greater benefits then will be extended to those remaining on strike, they do not support a finding of unfair labor practices. *NLRB v. Penokee Veneer Co.*, 168 F.2d 868 (22 LRRM 2254) (CA7).

"Turning then to the record in the instant case, viewing it as a whole, it appears that, during an economic strike, the letters sent to the employees and the meetings held with them were designed to accomplish but one thing; to ascertain just how many employees desired to return to work under the then existing pay scale, should respondent reopen its plant. There were no promises of other than normal benefit for those who returned, or threats or reprisal, if they failed to return. The record shows further that respondent requested that the employees attending the final meeting seek a vote of the Union to determine if the strike should be continued. This was rejected by the Union representative. The substantial evidence, viewing the record as a whole, points to only one conclusion, that the communications with the employees were made in good faith, did not interfere with, or coerce the employees in the exercise of their rights to organize and bargain collectively under Section 7 of the Act and were not of such a nature as to support a charge of unfair labor practices under Section 8 (a)(1) of the Act. Therefore, the conclusion of the Trial Examiner that the strike economic in origin, became an unfair labor practice strike because of these later activities, was unsupported by the record. The strike, in its inception, as he found, was economic in nature, it continued as such, until its termination on April 13, 1949."

The Examiner proscribed Respondent because it was in sympathy with the back to work movement (Tr. 159); it permitted the use of the shop by the employees (Tr. 155-159), it welcomed the back to work move-

ment (Tr. 154). Assuming these factors to be present, they do not constitute an unfair labor practice. In *Bradley Washfountain Co.*, *supra*, the employer not only wrote letters to the strikers, its officials paid personal calls on the individual strikers, arranged and attended meetings, providing the place for the meeting.

Solicitation of strikers to return to work is not unfair, *Celanese Corporation of America*, 95 NLRB 664; the statement to strikers in connection with such solicitation that seniority would be changed did not convert an economic strike into an unfair labor practice strike, *Blackstone Mills Inc.*, 109 NLRB 772; using an employee to attempt to convince the others not to strike is not wrongful action by an employer, *NLRB v. Reynolds & Manley Lumber Co.*, 212 F.(2d) 155 (CA 5th, 1954).

The Trial Examiner condemned Respondent because the strikers were "reminded" of their right to abandon the strike; they were "urged" to "think" about their own welfare; they were informed of the wages, hours and working conditions which would govern their employment (Tr. 162). This the Examiner concluded was a direct appeal to the employees to accept the Respondent's "final" offer.

First, there is no evidence that Respondent ever made a "final" offer. Further, the Record does not support the Examiner's conclusion. The facts in regard to this issue were stipulated. They are (Tr. 29):

"Bloom: If we go back now, how about the pay? Would we get the same rate of pay we're getting before the strike?

Nat Giustina: Now, just a word here about pay. The wages, hours and working conditions in effect at the start of the strike would be maintained."

By no manner of reasoning can this simple statement of fact be twisted into a proposal to those present to accept Respondent's "final offer." At most there were twenty-two people present. They could not accept the offer. Respondent did not state to the men that it had made any offer. Howden testified that he asked Respondent for an offer and was answered "There will be no offer (Tr. 271)." While Giustina, with reference to the same conversation, testified (Tr. 289):

"I'll make you an offer. Wages and working conditions as they were when you went on strike." They said, "Well, we can't talk to you by authority of the District Council."

It is inescapable that the crew had no knowledge of any offer of Respondent, if in fact one was made. At the July 28th meeting Respondent did not refer to any offer, nor did anyone else. Respondent, answering a pertinent inquiry, stated the fact. What else could have been said? A statement of an increase or decrease in wages would have been unlawful as a promise of benefit or a threat of discriminatory action. A statement of the fact cannot be twisted into a proposal, a promise or a threat.

The Letter of August 5, 1954

The Trial Examiner did not find that the letter of August 5, 1954 was unlawful interference. The letter reads (Tr. 8, 9):

"Operations at our plant in Eugene were re-

sumed July 29, 1954. Some of you have not returned to work. We plan to continue our Eugene operations. If you have not returned to work by Monday, August 9, 1954 to start the regular day shift, it will be considered that you have severed your employment and we will look to others to fill the jobs.

Criticizing the letter, the Examiner explained:

“In the light of the situation created by the Respondent’s antecedent encouragement of the back-to-work movement, and its direct exposition of the terms and conditions under which operations would resume, the letter in question necessarily involved something more than a written statement of the firm’s intention to exercise a lawful right under the statute.” (Tr. 163, 164)

“Under such circumstances, established decisional doctrines would seem to compel the conclusion that the Respondent had lost its right to treat the Union employees as economic strikers, and to notify them that, upon their failure to resume work by a definite date, the firm would exercise its statutory right to replace them.” (Tr. 164)

“Employees in receipt of such a letter, I find, could reasonably be expected to assess its significance in the light of the Respondent’s antecedent effort to encourage a back-to-work movement, and to deal directly with prospective returnees. When so considered, its essential significance as solicitation with respect to the abandonment of the strike, coupled with a threat to the employment status of those oblivious to its implicit appeal, would seem to be patent.” (Tr. 165, 166)

It is patent that the Trial Examiner did not consider that the letter alone was an unfair practice. His conclusion is predicated upon the prior one that Respondent had negotiated with the strikers and coerced them. We

have shown the errors of the Trial Examiner that destroy that conclusion. With the fall of this basic premise of the Trial Examiner, his conclusions as to the letter also must collapse.

He found further that the statement that those who did not return would be replaced constituted coercion because Respondent had committed an unfair labor practice. We have shown the fallacy inherent in this conclusion.

Considering the letter, the Trial Examiner emphasized that no action taken by Respondent after the letter was written can be described as inconsistent with his construction of the letter as a termination notice (Tr. 166). The record shows that the parties stipulated:

“Thereafter (after the letter of August 5), more employes who had been on strike returned to work and with new employes have continued Respondent’s operations (Tr. 34).”

Compare also the references of the Trial Examiner showing clearly that “strike breakers” returned to work and thereafter were discharged for failure to report to work after they had returned to work (Tr. 188).

This topic is considered further, *infra*, pp. 36-38.

The Charge of Refusal to Bargain

We consider now the status of the Union with respect to the charge that Respondent failed to bargain with it after the strike started. It is Respondent’s position that collective bargaining is the mutual obligation of the employer and the representative of the employees

(Section 8(d); that when either the employer or the Union is not negotiating in good faith, the other party to the bargaining cannot be convicted of not bargaining in good faith for then there is no mutual obligation. The duty to bargain, imposed upon the employer, is to bargain with the representative of the employees. Local Union No. 2611 was the recognized bargaining agent (Tr. 38).

We submit further that when either party to negotiations enters upon negotiations with a closed mind, a refusal to consider the discussion or counterproposals of the other, there is a refusal to negotiate in good faith. Also, when an employer or a bargaining agent vests in another the power to agree or to disagree, that party cannot meet the statutory requirement to bargain mutually in good faith.

The record shows that the Council (not the Local Union) opened on wages (Tr. 41, App. B, Tr. 268), "in 1948, the District Council was given permanent authority to act on general wages raises for local unions (Tr. 269) * * *. We have the right to negotiate on everything but wages (Tr. 270)."

The Trial Examiner (Tr. 184-186) characteristically attempted to evade the full force of these facts. He pointed out that the Council did not administer contracts; did not negotiate contracts and did not claim to be the bargaining agent. These comments are beside the point. The point is that the bargaining agent, Local No. 2611, did not bargain. Howden, as Council representative, asked Respondent to make an offer (Tr. 271); the

Council had the right of negotiation (Tr. 272, 273); the Council received the copies of the Governors' proposal (Tr. 273). The Local Union was completely ignored by the Council. The Trial Examiner found some comfort in the fact that Howden, the business agent, was also a member of the Council (Tr. 185). But Howden acted as Council representative, not as a representative of the Local (Tr. 271).

Even when the Governors' proposal was available, the Local did not submit it to Respondent. The proposal became the only basis for settlement by decision of the Northwest Council and the District Council (Tr. 273, 276).

The facts are that at the meeting of August 31st, relied upon by the Trial Examiner to support a conclusion of a failure to bargain, the bargaining agent, Local No. 2611, was not present; it had transferred permanently its authority to the District Council; the District Council would settle only on the basis of the Governors' proposal (Tr. 276). Respondent, under these circumstances, was under no obligation to bargain.

Local 2611 had represented the employes of Respondent for collective bargaining purposes for many years. Prior to the 1954 negotiations, Local 2611 transferred its bargaining rights over wage adjustments to the Willamette Valley District Council of Lumber & Sawmill Workers. This transfer was so absolute that Respondent was threatened with strike action if it attempted to negotiate with the Local Union—the legal bargaining agent.

Superimposed upon the Willamette Valley District Council was the Northwestern Council of Lumber and Sawmill Workers. The Northwestern Council was composed of representatives of the various District Councils. When the Governors' Fact Finding Committee formula was proposed as a method to settle the strike, the Northwestern Council adopted it as the basis for settlement.

Other factors must be given consideration in evaluating Respondent's conduct at the August 31st meeting. Prior to this meeting, Winey and associates, a group of Respondent's employes, had filed a petition to the Board for decertification of Local 2611 as the bargaining agent for Respondent's employes (G.C. Ex. 3, p. 52, p. 135). At this time Respondent's sawmill was operating with a complement of a normal crew. These men were going to work through the picket line, and, by so doing, vividly expressed their repudiation of the bargaining agent (Tr. 304, 312).

Article VIII of the Working Agreement (Tr. 38) provided that wages shall continue subject to the right of either party to request a general wage change. Article IX (Tr. 38, 39) reads:

"The Company and the Union agree that the grievance procedures specified hereinabove in Article II are adequate to provide a fair and final determination of all grievances arising under the terms of this agreement.

"Therefore, during the life of this agreement no strike shall be caused or sanctioned by the Union or any of its members and no lockouts shall be entered upon by the Company until every peaceable method of settlement of the difficulties involved, as provided

hereinbefore in Article II, shall have been tried and the parties hereto have been unable to resolve their differences.”

The Article then details additional steps to be taken by the parties before a strike or lockout may be called without the strike or lockout being a breach of the contract. These steps were not taken.

It is against this background that Respondent's actions at the August 31st meeting must be weighed. At that meeting Respondent told the representatives of the District Council (not of Local 2611) that the Fact Finding Formula did not apply to it (Tr. 35). This inapplicability is obvious. Point 1. of the Formula (Tr. 48) is “Returning all crews to work as soon as practical.” Respondent could not meet this requirement. Prior to that time, August 26, 1954, it had a normal crew working (Tr. 304, 312).

Respondent said further that the decertification petition threw doubt upon the status of the bargaining agent, and until the question of representation was resolved, Respondent did not feel it proper to negotiate (Tr. 35). The Trial Examiner concluded that Respondent was charged with knowledge of the law that the decertification petition was not timely as the contract with Local 2611 was a bar to the representation question (Tr. 168-172).

The Trial Examiner relied upon *Penn Broadcasting Company*, 93 NLRB 1104 (Tr. 168). That case holds that an employer may continue to bargain with the Union where the rival claim of recognition is specious

and untenable. The Board in the *Penn Broadcasting* case did not hold it would have been an unfair practice if the employer had refused to bargain until the question of representation was settled. That precise point was considered by the Board in *Union Carbide & Carbon Corp.*, 105 NLRB 57, 32 LRRM 1277. In this cited case the Board clearly held contrary to the Trial Examiner's contention, saying:

"We agree with the Respondent that the filing of the petition raised a *prima facie* question concerning representation which, under the "Midwest Piping" doctrine, precluded it from bargaining further with the incumbent union during the pendency of the petition. The Board has held that the mere filing of a petition by a rival union seeking to dislodge an incumbent union, such as that here, does not itself require an employer to refrain from continuing to recognize the incumbent statutory representative.

"But we also pointed out that, in continuing the established relationship with an incumbent union, an employer runs the risk of an unfair labor practice finding if the Board later determines that the petition raised a 'real question concerning representation'. It would therefore be manifestly unfair to *require* an employer who has engaged in no antecedent unfair labor practice, to bargain at his peril during the pendency of a timely petition.

"We are convinced by the record as a whole that during the pendency of the petition and after its dismissal by the Board there was a reasonable basis for the Respondent to have believed that the Union no longer represented a majority of the employees. Thus, the Union's certification was about 5 years old. It had just terminated an unsuccessful strike which resulted in the replacement of a large number of Union adherents. The Independent had made

a rival claim of representation upon the Respondent, and implemented it by filing a representation petition. As stated above, the Independent's petition was administratively dismissed by the Board, not because its claim was unfounded, but because of the pendency of certain charges filed by the Union which have been found herein to be without merit."

William Penn Broadcasting Co., 93 NLRB 1104, relied upon by the Trial Examiner was held to be inapplicable under these circumstances.

This point was considered by the Court of Appeals for the Seventh Circuit in a case remarkably similar to the instant one—*N.L.R.B. v. Bradley Washfountain Co.*, 192 F.(2d) 144, 29 LRRM 2064. It there appeared that while a strike was still under way, a decertification petition was filed by a group of employees who were working behind the picket line. In that case, as here, the Board decline to act on the petition because unfair charges were pending. Thereafter the employer refused to recognize the Union. Said the Court:

"An employer may not refuse to recognize a Union that has lost its majority status if the cause of the loss was unfair labor practice by the employer, or if the loss occurred during a period when the employer was engaged in unfair labor practices. *International Association of Machinists v. N.L.R.B.*, 311 US 72, (7 LRRM 282); *Franks Bros. v. N.L.R.B.*, 321 US 702, (14 LRRM 591). However, neither of these rules is applicable here. The Board has held that an employer commits an unfair labor practice when he recognizes a union under circumstances where a question of representation has been raised. *Midwest Piping and Supply Co.*, 63 NLRB 1060 (17 LRRM 40); *International Harvester Co.*, 87 NLRB 1101 (25 LRRM 1195). Certainly such a

question was raised here. It would appear then, in the normal course of procedure, that it became incumbent on the Union to petition the Board for a determination of the question of representation. This it did not do; yet it is undisputed that a majority of the members had of their own accord, petitioned for decertification. To say that an employer in such a situation, with amicable relations with the Union for 10 years, learning that a majority of the members had voluntarily disclaimed a desire to be connected with it longer, still owed a duty to recognize it is to rob the act of all realities and practicalities. Thus in *Pacific Gamble Robinson Co. v. N.L.R.B.*, 186 F.(2d) 106 (27 LRRM 2206) (CA-6), the court said:

“ ‘The employer had recognized and bargained with the union and both the trial examiner and the Board found that up to August 30 no unfair labor practice existed. The union’s agent, Alsten, testified that after the strike occurred he made no attempt to contact the employer. The employer is entitled to have its conduct considered in the light of this history with its complete absence of hostility to the union. *National Labor Relations Board v. Penokee Veneer Co.*, 7 Cir. 168 F(2d) 868, 4 ALR 2d 1350 (22 LRRM 2254), *National Labor Relations Board v. Algoma Plywood and Veneer Co.*, 7 Cir. 121 F(2d) 602 (8 LRRM 777); *National Labor Relations Board v. Kingston*, 6 Cir., 172 F(2d) 771, 774 (23 LRRM 2387).’ ”

Enforcement was denied.

Even in the instant case the holding of the Board was contrary to that of the Trial Examiner. Upon appeal from the ruling of the Regional Director dismissing the Winey petition, the Board held that the pendency of an unfair labor practice charge barred the election. Even though this ruling was presented to the Trial Examiner

(G.C. Ex. 2, App. 1, Tr. 48), he chose to ignore it and based his decision upon a principle held by the Board to be inapposite.

The Letter Terminating Agreement

The Trial Examiner seized Respondent's letter to Local 2611 terminating the agreement (G.C. Ex. 2, App. K, Tr. 50), as added proof of Respondent's "unlawful" conduct. He pointed out (1) that Article XIII of the Agreement (Tr. 40), did not provide for such notice; (2) that the letter "could be expected at the very least to persuade them, whether strikers or strike breakers, that the Union had lost in influence as their bargaining agent. Under all the circumstances, therefore, the dispatch of the letter must also be characterized as a refusal to bargain in good faith * * * and as interference, restraint and coercion directed to the Respondent's employees" (Tr. 173).

This letter was sent to Local Union No. 2611 on September 2, 1954, after the meeting of August 31st, during which Respondent raised the question of representation.

To answer the points made by the Trial Examiner, the letter does fall within the terms of Article XIII of the Agreement. That Article provides that notice of termination must be given at least 75 days before April 1st. The letter of September 2nd complies literally with this requirement. It was given at least 75 days before April 1st.

The notice of termination cannot be equated with a

refusal to bargain. The Act, itself, defining Collective Bargaining, Section 8(d), recognizes that a notice to terminate is not a refusal to bargain. Since Respondent lawfully could refuse to bargain until the representation question was settled, the letter could not destroy the legality of that position, even if it be construed as the Trial Examiner would have it.

Once more the Trial Examiner reached to find that the Respondent, by means of the letter, impaired the Union's position as bargaining agent; attempted to persuade the strikers and strike breakers that the Union had lost its influence; and interfered with, restrained and coerced its employes (Tr. 173). Had Respondent broadcast this letter to the employes, the Trial Examiner's conclusion would be worthy of consideration. But the letter was sent to the Local Union. There is no evidence that Respondent publicized the letter; there is no evidence that the letter ever came to the attention of anyone. The letter could have had no influence upon the "strikers or strike breakers;" it could not have interfered with, coerced or restrained them. They never saw it.

Actually the conclusions of the Examiner with respect to the letter serve only to emphasize his purpose to convict Respondent one way or another.

There is an additional answer to the questions asked by the Trial Examiner,—“why did Respondent send the letter?” We have pointed out above that the labor agreement contained a no-strike clause. A strike in violation of the terms of that clause is a breach of a material term

of the contract. When such a breach occurred, Respondent had a choice of remedies—rescission or an action for damages. The letter was respondent's election to rescind. *Boeing Airplane Co. v. Association of Machinists*, 91 F.S. 596 (DCWD Wash. 1950), approved by this Court, 188 F.(2d) 356; certiorari denied 342 U.S. 821.

The Trial Examiner did not meet this point (Tr. 177-182). After several pages of conjectures and evasiveness, he concluded (Tr. 181):

“I would find it by no means clear, in short, that the Respondent was privileged to treat a strike incidental to general wage negotiations as a material breach of the agreement's strike and lockout clause.”

The Trial Examiner has apparently confused some rule relating to Burden of Proof with the construction of this contract. The contract is clear—there shall be no strikes or lockouts until the procedures agreed upon have been followed. Wages are covered by the contract. There is no limit placed upon the number of times either party could request a wage adjustment (Article VIII, Tr. 38). The no strike clause served a worthwhile purpose under these circumstances.

The Trial Examiner suggested that a strike over a wage demand would not breach this clause, while a strike over a grievance, however petty, would be a material breach of the clause. The Trial Examiner overlooked the fact that the impact of a strike upon Respondent is the same, regardless of the cause of the strike. The purpose of the clause is to prevent any strike. The substance of materiality is found in the purpose of

the clause to prevent strikes, not the reason for the strike.

As a matter of fact, the clause adopted sensible mature methods to avoid work stoppages. A cooling off period was included. In addition, the requirements of written statements of position and notice of action would force the parties to carefully reconsider their respective positions. Such reconsideration and written statements of position would tend to eliminate personal or emotional reasons for a work stoppage.

Economic or Unfair Practice Strike

These are the undisputed facts.

The strike started as an economic strike—one for a wage increase. Before the strike Respondent's mill operated the usual day shift, and ran a temporary second shift. The life of the second shift depended upon favorable market conditions and an adequate supply of logs. After the strike had continued a while, Respondent abandoned the second shift because logs could not be accumulated to maintain it. There is no charge or finding that the discontinuance of this shift was an unfair practice.

The Trial Examiner concluded that the strike was converted into an unfair labor practice strike by "unfair practices" of Respondent which prolonged it. The Examiner did not find the specific date after which the strike would be considered an unfair practice strike. He concluded (Tr. 173, 174, 177):

"In the light of the available evidence there can

be no doubt that each element in the Respondent's course of action as detailed above, and its entire course of conduct, involved the unfair labor practices found and served, necessarily, to convert the Union's antecedent economic strike into an unfair labor practice strike."

"Specifically, it may be noted that the Respondent's employees still on strike after August 5, 1954, voted overwhelmingly—at a regularly called Union meeting—to return to work as a group. In effect, this was a vote to extend or continue the strike, despite the apparent success of the back-to-work movement and the resumption of operations at the Respondent's plant. It should be noted, also, that the Respondent's operation was the only one previously under contract with a constituent local of the District Council at which the so-called 'industry-wide' strike remained current after the publication of the Governors' Proposal with respect to a strike settlement."

"Upon the entire record, therefore, I find that the Respondent's course of conduct between July 28, 1954, and September 2, 1954, previously detailed, whether considered in its totality, or as a series of severable incidents—involved a refusal to bargain in good faith with the Union, as the statutory representative of its employees in an appropriate unit, and interfered with, restrained, and coerced these employees in the exercise of rights statutorily guaranteed. And in accordance with the General Counsel's contention, it is further found that the firm's course of conduct converted the strike then current into an unfair labor practices strike, and that it served to extend and prolong the dispute beyond the time within which it might conceivably have been settled if confined to the wage issue only."

The established facts are: the strike against Respondent was part of the industry wide strike (Tr. 117). The

industry wide strike was still current as late as August 26th (Tr. 135). August 31st, 1954, the Governors' Fact Finding Formula was proposed to Respondent as the basis to settle the strike. After the strike started and until August 31st, no request to negotiate was made to Respondent.

It is undisputed that Respondent was operating its sawmill with a full normal crew before August 15, 1954—more than two weeks prior to the submission of the Governors' formula to it.

By August 15th the positions of all of the strikers had been filled; the strikers had been replaced. Not later than August 15th the strikers had lost all employe relationships with Respondent. Nothing Respondent did extended the strike from July 28th to August 31st, the date of the meeting. At least during that period the strike was continued for the cause that initiated it—the Union wage demand. Anything that happened after August 15th is immaterial.

Assuming an unfair practice was committed at the July 28th meeting, assuming that the letter of August 5th was unfair, the strike until August 31st still was motivated by economic reasons. Before then all positions in Respondent's crew had been filled; all rights of reinstatement had ended. *Black Diamond Steamship Corp. v. N. L. R. B.*, 94 F.(2d) 875 (C.A. 2, 1938); *N. L. R. B. v. Remington Rand, Inc.*, 130 F.(2d) 919 (C.A. 2, 1942); *N. L. R. B. v. Pecheur Lozenge Co.*, 209 F.(2d) 393 (C.A. 2), c.d. 347 U.S. 953. The Union did not rep-

resent the new crew. Any action by Respondent towards the Union, such as a refusal to bargain, was meaningless.

The controlling principles are clearly established. In *N. L. R. B. v. Scott & Scott*, No. 15144, decided by this Court on May 15, 1957, the Court said:

“In *Winter Garden Citrus Products Cooperative v. National Labor Relations Board*, 5 Cir., 238 F.2d 128, 39 LRRM 2080, upon finding that such causal connection was not shown, the court refused to enforce the order requiring reinstatement. A like result obtains where unfair labor practices are claimed to prolong a strike, and no causal relation between them is shown. *National Labor Relations Board v. James Thomson & Co.*, 2 Cir., 208 F. 2d 743, 749, 33 LRRM 2205; *National Labor Relations Board v. Jackson Press, Inc.*, 7 Cir., 201 F.2d 541, 546, 31 LRRM 2315; *National Labor Relations Board v. Crosby Chemicals, Inc.*, 5 Cir., 188 F. 2d 91, 95, 27 LRRM 2541. No view to the contrary is expressed in *National Labor Relations Board v. West Coast Casket Co.*, 9 Cir., 205 F. 2d 902, 32 LRRM 2353, since that case merely holds that there was substantial evidence to support the finding of the Board that the strike was caused in part by an unfair labor practice.

The expression of the Trial Examiner which was affirmed by the Board, is inconclusive, argumentative and inconsequential. It is based upon a single statement of a highly partisan witness long after the event when everything was suggesting that this foundation be laid.”

In addition to the cited cases see *Blackstone Mills, Inc.*, 109 NLRB 772 (1954).

Counsel recognizes the weakness of his position, suggesting that the caused be remanded to the Board to determine which of the strikers had not been replaced (Br. 31, note 17).

Remand is not necessary. The uncontroverted evidence is that all positions had been filled; all strikers were replaced.

The Violation of Section 8(d) of the Act

The Board, after consideration of the Report of the Examiner, rendered a divided Decision. The Majority held that Respondent did not raise the issue of violation of Section 8(d); and, if it did so, it waived the point (Tr. 214-216). The minority held to the contrary—that Section 8(d) was violated with the result the strikers forfeited their status as employees (Tr. 219-225).

The majority of the Board did not disagree with the soundness of the views of the Dissent. The majority impliedly recognized the validity of the Dissent by concluding that Respondent had waived the point.

Such is not the fact. The Act provides (Section 10(e):

“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”

The Dissent of Mr. Rogers expresses more forcefully and clearly than can we the violation of Section 8(d) by the Union.

In finding a waiver the majority said (Tr. 215, 216):

“Insofar as any 8(d) issue was raised, the Trial Examiner found that it was limited to 8(d)(4) and concluded that under the Board’s decision in Lion Oil Company there was not merit in the contention.

In its exceptions to the Board, the Respondent did not take issue with the Trial Examiner's so limiting the 8(d) issue nor with his failure to consider that 8(d)(1), (2), or (3) were involved in the case. Also, the Trial Examiner stated that the Respondent sought to justify its refusal to bargain because the employees were on strike. The Respondent excepted to this statement. Necessarily, the Respondent thereby completely negated any reliance upon Section 8(d)(4)."

The Trial Examiner in a parenthetical footnote said (Tr. 182):

"The Respondent's answer also contains a contention, by way of affirmative defense, that the Union's strike action constituted an unfair labor practice—within the meaning of the statute—apart from its character as a contractual breach; the firm argues, apparently, that the Union ought to be held responsible for a refusal to bargain in good faith because it resorted to strike action prior to the expiration date of the agreement with respect to which it desired to negotiate modifications. See *Section 8(d)(4) of the Act, as amended*. It is contended that the strike, therefore, relieved the Respondent of any obligation to deal with the organization. I would find the argument without merit. *Lion Oil Company*, 109 NLRB 680, 681-686, 34 LRRM 1410, set aside 221 F.2d 231 (C.A. 8), pet. for cert. filed July 15, 1955. (Emphasis added.)

The majority stated that "the Trial Examiner found that it was limited to 8(d) 4 . . . (Tr 215, 216). There is no such finding made by the Trial Examiner. He attempted to state the position of Respondent. He assumed it to be that the Union ought to be held responsible for a failure to bargain. He incorrectly reported Respondent's position and Respondent excepted to that

error. The point to Section 8(d), in this proceeding, is that, by violating it, the strikers forfeited employment rights, with the consequences that flow from such a violation.

Respondent raised the issue at its first opportunity. Its answer charged that the strike was an unfair labor practice. The only unfair labor practice that a Union could commit against Respondent was a violation of Section 8(d). No motion to make more definite and certain or for a bill of particulars was filed by the General Counsel. The issue was raised before the Trial Examiner (Tr. 220); it was raised before the Board by Motion for Reconsideration (Tr. 228-233).

The only unfair labor practice committed by a Union that would be a defense to the charges against Respondent would be a violation of Section 8(d).

The rights enforced by the Board are public rights. The duties to be observed and performed by Respondent are owed to the public—not to a union; not to individuals. The Board is entrusted with the responsibility of seeing that the interest of the public is protected and fostered. *NRLB v. General Motors Corporation*, 116 F.(2d) 306 (C.A. 7, 1940); *NLRB v. Stackpole Carbon Co.*, 128 F.(2d) 188 (C.A. 3, 1942); *Anthony v. NLRB*, 132 F.(2d) 620 (C.A. 9, 1942); *NLRB v. Sunshine Mining Co.*, 125 F.(2d) 757 (C.A. 9, 1941); *Commodore Watch Case Co.*, 114 NLRB 1590 (1955).

We submit there was no waiver by Respondent.

These facts also should be considered in passing upon the order directing reinstatement with back pay. An

order of this character is issued again to promote the public welfare. We submit that such an order rewarding those who strike in violation of the Act is an abuse of the power of the Board. *Mackay Radio & Telegraph Co.*, 96 NLRB 106 (1951); *NLRB v. Kingston Cake Co.*, 206 F.(2d) 604 (C.A. 3, 1953).

We subscribe to the position of the Board in the *Mackay Radio* case. Faced with a comparable condition, the Board said:

“However, we believe that this case stands on a different footing. As already stated, the strike herein not only sought to compel the Respondents to violate the Act, but in itself constituted action which in an appropriate proceeding we would have found to violate Section 8 (b) (2) thereof. Accordingly, the strike in this case not only adversely affected the interests of the Respondents, but from its inception also contravened the public policy, as expressed in the Act of Congress, against conduct by unions and their agents such as is proscribed by Section 8 (b) (2). It is the task of the Board to enforce this public policy; and, even though the Respondents in this case may have condoned conduct violative of such policy, the Board itself, has no license to overlook such conduct. Under Section 10 (c) of the Act, the Board may order reinstatement or back pay for discharged employees only when such an order will effectuate the policies of the Act. We are unable to perceive how it will effectuate the Act’s policies to give relief to employees who have engaged in conduct violative of those policies. To do so would place the Board in the position of encouraging through its remedial processes, conduct subversive of the statute. It is rather incumbent upon the Board in a case such as this to discourage such conduct by denying any remedy to employees who have engaged therein. This result, we believe, is in accord with the decision of the Su-

preme Court in the *Southern Steamship* case, which held that an employer might lawfully discharge employees for engaging in a strike which was tantamount to mutiny, and hence a Federal crime, even though the employer had permitted the strikers to work for a time after the strike without raising the issue of its legality.

“In view of the unlawful character of the strike, the Respondents were privileged to solicit the return of the strikers in an effort to terminate the strike and at the end of the strike to discharge, discipline, or reinstate on their own terms employees who participated therein. As it is unnecessary to our decision, we express no opinion as to the legality of the Respondents’ actions under other circumstances. We find, accordingly, (a) that the Respondents’ solicitation of the strikers in this case did not violate the Act; and (b) that the Respondents’ restaffing policy as announced and as applied upon the conclusion of the strike and during the so-called period of “flux,” was not unlawful.”

The Complaint was dismissed.

THE BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

We do not accept the Statement of Facts by Counsel as an accurate one. Again, since the pertinent facts are stipulated we will not attempt to correct each misstatement, but we will cite a few instances to substantiate this statement.

1. Counsel asserts that the District Council acted as agent for the Union (Br. p. 4). This point we have discussed before. The Council did not act as agent, it acted as principal.

2. Council asserts that on June 28, Howden, business agent of the Union, advised Respondent that he would transmit an offer to the District Council. Howden testified that he was acting for the Council—not the Local Union. He did not offer to submit it to the bargaining agent nor to the District Council. He rejected it. He testified he received no offer.

3. Counsel suggests that before the meeting of July 28, Robertson had called Hughes (Tr. 6). The record does not support that statement.

4. Counsel devotes pages 21-24 to the “straw man” argument that Respondent knew the decertification petition was specious because of the contract bar principle. He, as did the Trial Examiner, ignored the ruling of the Board which did not adopt the contract bar theory.

5. Again, at page 29, Counsel states, “* * * the procedure to handle general wage disputes is outlined in a separate section of the contract, namely Article VIII * * *.” Article VIII reads (Tr. 38):

“ARTICLE VIII

“WAGES

“Wages shall continue subject to the right of either party to request a general wage change by giving the other party written notice of its desire for such general wage change. Negotiations shall commence within fifteen (15) days from the date the notice is received.”

The procedure to settle the wage issue is found not in Article VIII but in the no-strike clause, Article IX (Tr. 38).

Most of the argument submitted by Counsel has been answered in the foregoing parts of this Brief. Only a few further comments will be made.

Counsel to support the charge that Respondent went beyond the permissible limits of free speech during the meeting of July 28th cites *N.L.R.B. v. Montgomery Ward & Co.*, 133 F.(2d) 676, and *N.L.R.B. v. Sunshine Mining Co.*, 110 F.(2d) 780, among other decisions. These decisions, insofar as this issue is concerned, were decided long before the adoption of the Labor-Management Act of 1947 which provides:

“The expressing of any views, arguments or opinion * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat or reprisal or force or promise of benefit (Sec. 8(c)).”

It is not necessary to reconsider those decisions in the light of Section 8(c) as in each case more was done by those employers than by Respondent.

In the *Montgomery Ward* case, the employer stated that the store would never go Union.

In *Sunshine Mining Co.* not only were the Union representatives threatened, they were driven out of town by a company inspired vigilante group who also intimidated the strikers. There is no hint of such action in this proceeding.

N. L. R. B. v. Wooster Division of Borge Warner, 236 F.(2d) 898, is of interest. The Court does not detail the facts nor explain its reasoning. However, the employer did promise benefits in its appeal to strikers—it

offered free bus transportation to work. This promise alone takes the statements out of the protection of Section 8(c).

Clearfield Cheese Co., 213 F.(2d) 70, is distinguishable upon the same ground. Benefits were definitely offered, threats of reprisal that the Company would move out, were clearly made.

Counsel's authorities are not in point.

When we consider the letter of August 5th (Br. 19, 20), we find it difficult to reconcile decisions. The *Leach* case, 234 F.(2d) 400, is a per curiam opinion. The Court pointed out that the letter was followed by a notice of termination. *Beaver Meadow Creamery, Inc.*, 215 F.(2d) 247, and *U. S. Cold Storage Corp.*, 203 F.(2d) 924, were cited as controlling.

In these cases it was found that the Employer discharged or threatened to discharge the employees because of the strike.

In the *Beaver Meadow Creamery Case*, the Court approved *Kansas Milling Co. v. NLRB*, 185 F.(2d) 413. Examination of that decision will help to understand the views of the Court. In this case, the employer wrote a series of letters to the strikers. The letter of August 15th read in part:

"We sincerely hope that you will return to your jobs within the time fixed as we would far prefer to work with our old employees and have them receive the benefits now provided for. If you do not return, the company has no other alternative than to hire new employees to take the jobs which you have vacated. We trust this will not be necessary."

A later letter of September 6th advised the strikers that they were no longer covered by group insurance. Then on September 12th, the Company wrote the strikers:

“Since you have terminated your employment with this company, if you have any clothes or other personal belongings at the plant, we would like for you to call for them by September 16, 1947 * * *.”

Referring to these letters, the Court said:

“Whether the Board’s findings of unfair labor practices finds support in the record must be determined from consideration of the Company’s letters of August 11, August 15, September 6, and September 12. We see nothing coercive or threatening in the letter of August 11 set out in footnote 5. Summarizing this letter, it was the intent of the company to lay its case before the employees . . . and persuade them to return to work. The letter is mild factual . . .

“The letter of August 15 advised the employees that the Company intended to hire permanent replacements . . . and that if thereafter the strikers sought to return they might be out of a job . . . the company had a right to replace the strikers with other permanent employees and could thereafter refuse to discharge them to make room for the returning strikers. The Company was not obliged to advise the strikers what it proposed to do . . . How can it be said that a warning of what the Company had a right to do, without notice, constituted an unfair labor practice. The concluding sentence . . . does not support a finding that the Company thereby threatened the employees with discharge if they did not return to work by August 23. ‘Vacate’ is something used in the sense of leaving or going away.

“Neither is the letter of September 6 a violation . . . If their jobs, in fact, had been filled by per-

manent employees, they were no longer employees and would not be covered by the group policy . . .

“Neither does the letter of September 12, 1947, constitute a violation of the Act. True, it assumes that the strikers are no longer employees . . . If all of the jobs had in fact been filled by permanent replacements by that time, the strikers would have terminated their employment with the company and would not be employees.”

The letter of Respondent did not go beyond the limits permitted. The Trial Examiner did not find that it did. Respondent did not intend it as a notice of discharge. The strikers did not so consider it.

The decisions cited by Counsel (Br. 30) are not apt. In *Lettie Lee, Inc.*, 140 F.(2d) 243, the strike was caused by the employer's refusal to bargain. He also refused after the strike began. The question of converting an economic strike into an unfair strike was not involved.

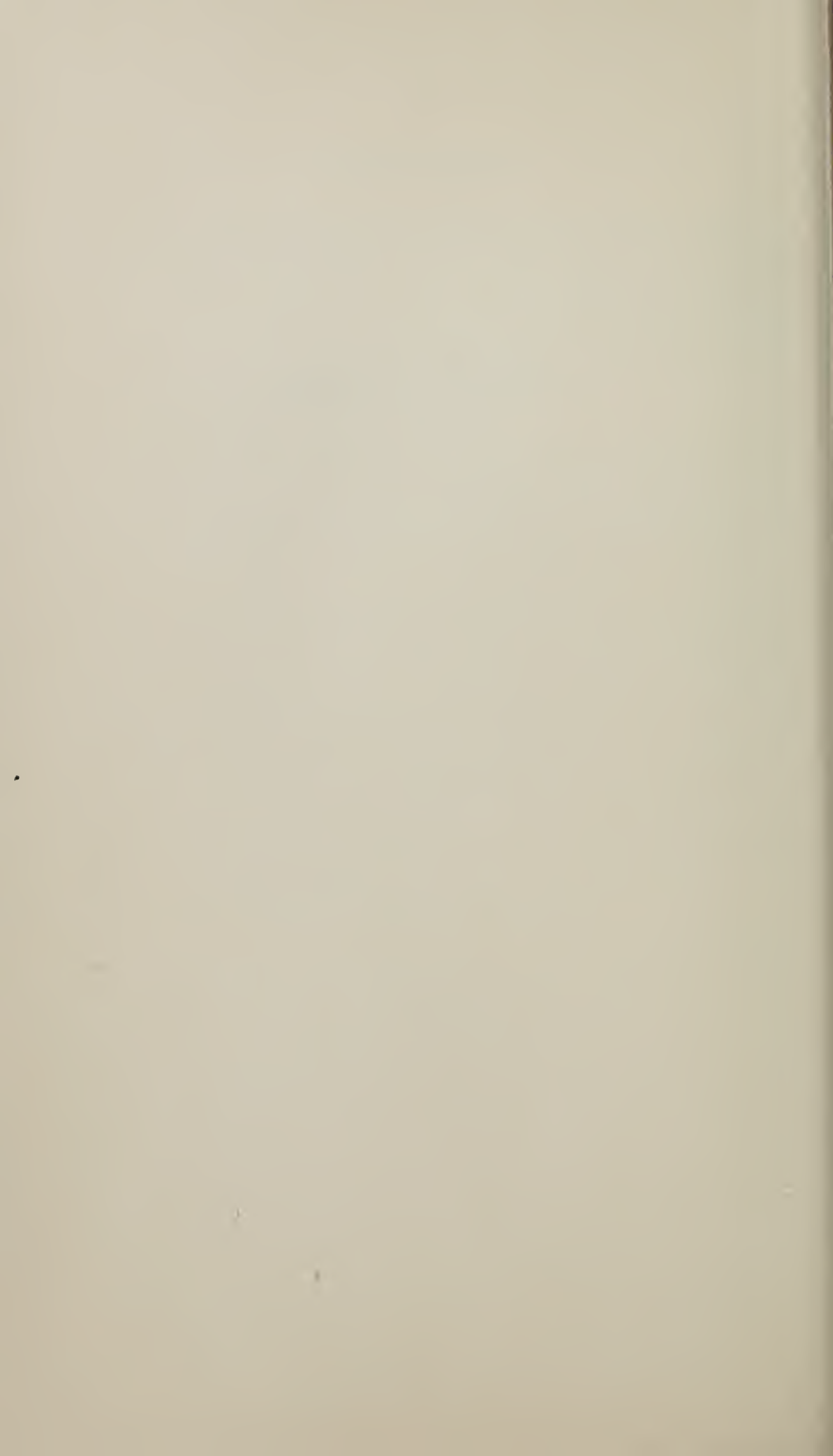
In the *Pecheur Lozenge Co.* case the Company refused to bargain unless the strike was abandoned. The causal relationship is clearly established.

In the instant case, Respondent's actions had nothing to do with causing or prolonging the strike. The strike started and continued as an industry strike. When the Governors' proposal was made, it became the Union demand. It did not fit the conditions facing Respondent.

CONCLUSION

The Order of the Board is not supported by the Record nor by controlling legal principles. Enforcement should be denied.

RICHARD R. MORRIS,
Attorney for Respondent,
Giustina Bros. Lumber Co.



APPENDIX

The relevant portions of the Labor-Management Relations Act of 1947 are:

Section 8 (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Section 8 (d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: **PROVIDED**, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no

expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under

the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.



No. 15,625

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GIUSTINA BROS. LUMBER CO.,
Respondent.

**PETITION FOR REHEARING AND BRIEF
IN SUPPORT THEREOF**

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FILED
APR 14 1958
PAUL P. O'BRYEN, CLERK



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To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Respondent, Giustina Bros. Lumber Co., petitions for
rehearing and respectfully submits:

1. The Court in its opinion said that Respondent resisted the entire order of the Board and so apparently the Court did not give consideration to defenses of Respondent against parts only of the order of the Board. In this it is submitted the Court erred. Respondent in its answer to the petition for enforcement expressly prayed that if the order be not set aside in full, that parts of the order be denied enforcement (R. 246, 247).

The failure to consider these partial defenses is to disregard the reviewing responsibility of this Court as enunciated in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474.

2. The Court erred in its conclusion that Respondent did not attack "the legal conclusion that the conduct of Respondent, if it in fact occurred, constituted unfair labor practices." As pointed out by the Court, the bulk of the testimony was stipulated by the parties (p. 3, footnote 10). By this stipulating of the facts, the only important issue that remained was the legal question—did the admitted facts constitute unfair labor practices. Counsel for Respondent before the Board and this Court has contended strenuously that the facts do not constitute unfair practices. If Respondent had not challenged the legal conclusions to be drawn from those facts, there was no point to be gained by Respondent in defending itself. Respondent has not confessed or admitted the commission of any unfair practice. The issues presented are legal. Respondent has not waived them. We refer to Respondent's Brief for our consideration of them.

3. The Court erred in holding the economic strike was prolonged by Respondent's conduct before the strikers were replaced.

The record shows the strikers were replaced by August 15th. The refusal to bargain is based on conduct which occurred August 31st, some sixteen days after the strikers were replaced.

What occurred at the meeting of July 28th with the employes could have no affect upon the duration of

the strike. The Local Union would not negotiate with Respondent. It had transferred bargaining authority to the District Council. The strike issue was a wage demand; it was not over recognition or a refusal to bargain. The industry-wide nature of the strike continued for a month more. Respondent did not refuse to negotiate with the Local Union before the strikers were replaced. Under these circumstances *West Coast Casket Co., Inc. v. N.L.R.B.*, 205 F.(2d) 902 and *Maestro Plastics v. N.L.R.B.*, 350 U.S. 270, are not in point. See *N.L.R.B. v. Scott & Scott*, 9 Cir., 245 F.(2d) 926.

Respectfully submitted,

RICHARD R. MORRIS

I, Richard R. Morris, do certify that in my judgment the foregoing Petition for Rehearing is well founded and not interposed for purposes of delay.

RICHARD R. MORRIS,
Attorney for Respondent.



BRIEF IN SUPPORT OF PETITION FOR REHEARING

A major objection presented by Respondent to the enforcement of the order of the Board is that the strikers against Respondent were replaced while the strike was an economic one. This issue received no apparent consideration by the Court. Presumably, it was dismissed by the Court by the general rejection of Respondent's contentions on the ground that it attacked the entire order of the Board.

By so doing the Court, we submit, erred. Respondent, in its answer to the Petition for Enforcement, presented this defense (R. 246). It concluded its answer to the Petition praying:

"Wherefore Respondent prays this Honorable Court that it deny enforcement of the Order of the Board in whole, or, if such prayer be denied, that it deny enforcement of the Order of the Board in such part as it is not supported by evidence as herein set forth, and insofar as denial (sic denied) relieve Respondent, its officers, agents and representatives of any necessity to comply therewith."

Furthermore, this approach to the case adopted by the Court is inconsistent with the duty imposed upon it, as a Court of review, by the Supreme Court in the *Universal Camera* case, 340 U.S. 474, 490. The Court there said:

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past.

Reviewing courts must be influenced by conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The Board found that Respondent committed an unfair labor practice by its participation in the back to work meeting on July 28. Assuming the Board's finding to be warranted by the evidence, that finding is not decisive of the issue. It must also be shown that that unfair act converted the economic strike into an unfair practice strike before the strikers were replaced. The record establishes that this meeting and Respondent's conduct could not have had the slightest effect upon the continuance of the strike.

We turn to the facts in this case and the applicable law. There is no dispute as to either. It is conclusively established that:

1. The Lumber and Sawmill Workers' Union called a strike against many lumber operations in Oregon and Washington to support its demand for a wage increase. Respondent was just one of the operations whose employees struck. The Local Union which represented

Respondent's employes participated in the strike. The strike was industry-wide. It was not confined to Respondent's operations.

2. The industry wide strike continued as an industry strike (not one directed solely at Respondent), until the last of August. During this entire period of the strike the Local Union had delegated its negotiating authority to the Willamette Valley District Council of Lumber and Sawmill Workers. Respondent, similarly, had delegated bargaining authority to an operators' group—Willamette Valley Lumber Operators Association. During this period of the strike no effort was made by the Local Union or the District Council to settle the strike with Respondent.

August 26 a Committee appointed by the Governors of the States of Oregon and Washington proposed a formula to settle the issues over which the strike was called. By acceptance of this formula the industry strike was settled.

3. A back to work movement started among the employes of Respondent the latter part of July—one month before the industry strike was settled. As a result, some of the strikers returned to work. Other strikers also went back to work. These returning strikers were supplemented by other employes in sufficient numbers so that by August 15 Respondent had a full complement of employes at work. At that time—August 15—all strikers had been replaced.

These facts are uncontradicted. The law is as clear as these facts. The controlling principles are:

Employees who engage in an economic strike may be replaced by other workers. When such strikers are replaced they no longer possess any employment rights.

The commission of an unfair labor practice by an employer after an economic strike has started does not prevent the employer from replacing strikers. The commission of an unfair practice is material only if it be established that it prolonged the strike. Persons employed as replacements after the strike started and before it was converted into an unfair labor practice strike lose their status as employees by the act of replacement.

These controlling principles are not questioned. They are well established. This Court, in *N.L.R.B. v. Scott & Scott*, 245 F.(2d) 926, considering this question, said:

“The Trial Examiner assumed for the sake of argument that the discharge of Ross was the motivation for the strike. The subsequent evidence before the Board must have established a casual connection between any unfair labor practice now found and the subsequent strike.

In *Winter Garden Citrus Products Cooperative v. National Labor Relations Board*, 5 Cir., 238 F. 2d 128 (31 Labor Cases Par. 70,317), upon finding that such casual connection was not shown, the court refused to enforce the order requiring reinstatement. A like result obtains where unfair labor practices are claimed to prolong a strike, and no casual relation between them is shown.”

“No view to the contrary is expressed in *National Labor Relations Board v. West Coast Casket Co.*, 9 Cir., 205 F.2d 902 (23 Labor Cases Par. 67,712), since that case merely holds that there was

substantial evidence to support the finding of the Board that the strike was caused in part by an unfair labor practice.”

In the *Winter Garden Citrus Products Cooperative* case, approved by this Court, the Court said:

“There must be proof of casual connection between the two to justify the finding that the strike was bottomed in part upon unfair labor practices entitling striking employees to reinstatement.

A careful reading of the evidence here fails to convince us that the Board had before it substantial evidence upon which to base its findings of such a casual connection.”

It is equally clear that strikers replaced before an economic strike is converted into an unfair labor practice strike, no longer have employment rights. *Black Diamond Steamship Corp. v. N.L.R.B.*, 94 F.(2d) 875 (C.A. 2, 1938), *N.L.R.B. v. Remington Rand, Inc.*, 130 F(2d) 919 (C.A. 2, 1942), *N.L.R.B. v. Pecher Lozenge Co.*, 209 F.(2d) 393, (C.A. 2, 1953) c.d. 347 U.S. 953.

The General Counsel, neither in his Brief nor in oral argument, has referred to any evidence to show that the strikers were not replaced by August 15th. He has not cited any occurrence or evidence to establish that the strike was converted into an unfair labor practice strike prior to August 15th. He does not make any serious contention to the contrary—nor will the record support such a contention.

The strike was an industry-wide strike in Oregon and Washington. Respondent's operation was just a small part of that strike. The Union representing Re-

spondent's employes had delegated bargaining authority to the District Council—making it an integral part of the industry strike. The industry strike continued at least until August 26th. Nothing that occurred at Respondent's operation, nothing Respondent did prior to August 26, could change the character of the economic strike prior to the time of the industry settlement about August 26th. During that period the strikers were replaced.

We submit that after the strikers were replaced they had no employment rights and Respondent was under no obligation to reinstate them; after these replacements, the Local Union no longer represented the men and Respondent could not lawfully bargain with it.

The portions of the Order directing Respondent to offer reinstatement to the strikers and to bargain with the Local Union clearly cannot be supported.

In view of the assumption by the Court that Respondent raised no legal issues and no partial defense, we submit Respondent is entitled to a rehearing.

Respectfully submitted,

RICHARD R. MORRIS.

No. 15626 ✓

United States
Court of Appeals
for the Ninth Circuit

WONG HO, as Guardian ad Litem of WONG
KWOK WEI, Appellant,
vs.

JOHN FOSTER DULLES, as Secretary of State,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

OCT - 1957

No. 15626

United States
Court of Appeals
for the Ninth Circuit

WONG HO, as Guardian ad Litem of WONG
KWOK WEI, Appellant,
vs.

JOHN FOSTER DULLES, as Secretary of State,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

REPORT

ON THE

PROGRESS OF THE

WORK

OF THE

COMMISSIONERS

OF THE

LAND OFFICE

IN

THE

YEAR

1861

AND

THE

PROGRESS

OF THE

WORK

OF THE

COMMISSIONERS

OF THE

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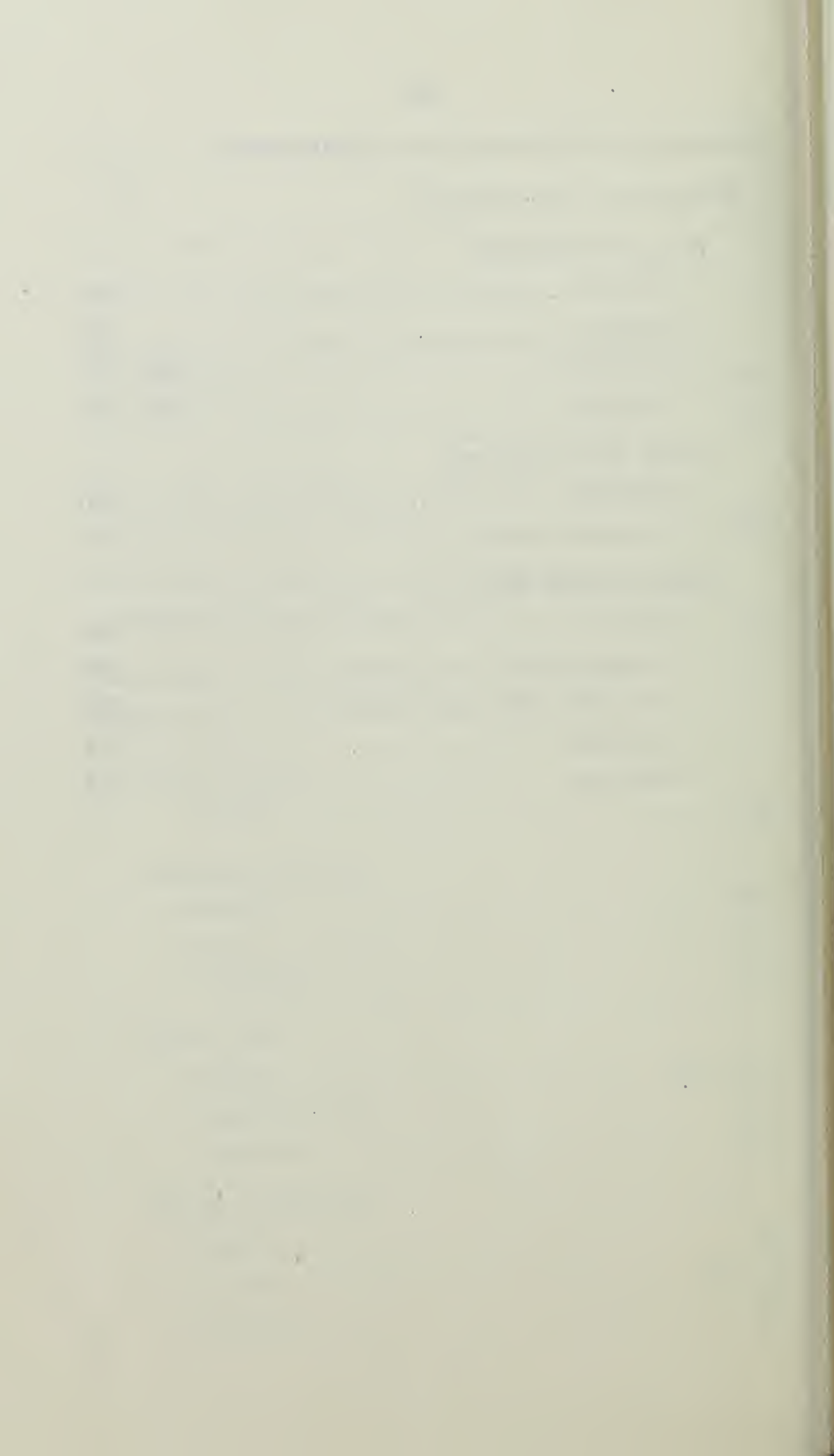
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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JACKSON & HERTOGS,
580 Washington Street,
San Francisco, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant United States Attorney,
Chief, Civil Division,

JAMES R. DOOLEY,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

In the United States District Court, Northern
District of California, Southern Division

No. 30489

Southern District No. 20144-BH

WONG KWOK KEUNG and WONG HO, as
Guardian ad Litem of WONG KWOK WEI,
Plaintiffs,

vs.

DEAN ACHESON as Secretary of State,
Defendant.

PETITION FOR DECLARATORY JUDGMENT
UNDER SECTION 503 OF THE NATION-
ALITY ACT OF 1940

Come now the plaintiffs, Wong Kwok Keung and
Wong Kwok Wei, by his guardian ad litem, Wong
Ho, complain of the defendant and for causes
allege:

I.

For the purpose of this action Wong Ho was
appointed by the above-entitled Court and now is
the guardian ad litem of plaintiff, Wong Kwok
Wei, minor;

II.

That the said plaintiffs are the true and lawful
blood children of Wong Ho who is a native of the
United States; that as evidence of United States
citizenship, Wong Ho holds Certificate of Identity

No. 14761 issued April 28, 1914, by the Immigration Service at San Francisco, California;

III.

That the said Wong Ho was first admitted to the United [2] States as a citizen thereof on April 22, 1914, at San Francisco, California, ex SS "Manchuria"; following his departure for China on December 1, 1912, ex SS "Mongolia"; that Wong Ho has been a permanent of the State of California since his birth and now resides in San Francisco, California; that since his original admission in 1914, Wong Ho has made two trips from the United States to China, departing and returning at the Port of Seattle, Washington, on the dates and vessels shown:

Departed December 10, 1921, ex SS "Palm Tree State"

Returned December 1931 ex vessel of Blue Funnel Lines

Departed June 2, 1934, ex SS "Empress of Canada"

Returned July 1937 ex SS "President Jackson"

IV.

That the said Wong Ho was married to Yee Shee on CR 1-12-10 (January 16, 1913) at Wong Oak Village, Hoyping District, Kwangtung Province, China; that such marriage was contracted in accordance with the marriage customs and ceremonies approved and legally recognized in China; that no official record of such marriage is available in

China so far as Wong Ho is informed; that the plaintiff Wong Kwok Keung was born at Chung Hing Village, Toyshan District, Kwangtung Province, China, on CR 11-9-3 (October 22, 1922); that the plaintiff Wong Kwok Wei was born at Chung Hing Village, Toyshan District, Kwangtung Province, China, on CR 24-3-28 (April 30, 1935); that the plaintiffs, Wong Kwok Keung and Wong Kwok Wei, are issues of the aforesaid marriage of Wong Ho and Yee Shee; that the marriage and the birth of said plaintiffs were duly reported to the Immigration and Naturalization Service by the said Wong Ho upon each and every occasion of his examination by that Service;

V.

That the said Wong Ho is and has been for more than the past ten years a resident within the Northern District of California, and that the petitioners, Wong Kwok Keung and Wong Kwok Wei, claim [3] permanent residence in the Northern District of California and within the jurisdiction of this Court.

VI.

That the said Wong Ho caused to be filed with the American Consulate General at Hong Kong on or about March 8, 1950, an application for the issuance of a United States Passport or travel document in behalf of the plaintiff, Wong Kwok Keung; that the said Wong Ho caused to be filed with the same official on or about the 12th of April, 1950 a similar application in behalf of the plaintiff, Wong

Kwok Wei; that the plaintiffs, Wong Kwok Keung and Wong Kwok Wei, were advised by the American Consulate General at Hong Kong in a letter dated April 15, 1951, that their applications had been disapproved; and that a copy of the letter from the American Consulate General dated April 15, 1951, is attached hereto, marked Exhibit "A", and made a part hereof as if fully incorporated herein;

VII.

That Section 1993, United States Revised Statutes, as amended by the Act of May 24, 1934, and the Nationality Act of 1940, provides that a child born in a foreign country of a United States citizen parent must reside in the United States for at least five years prior to attaining the age of 21 years, viz., that he must arrive prior to attaining the age of sixteen years; said plaintiff, Wong Kwok Wei, attains the age of sixteen years, American calendar, on April 30, 1951; that the said Wong Kwok Wei claims that the refusal of the American Consulate General at Hong Kong to permit the said Wong Kwok Wei to proceed to the United States prior to attaining the age of 16 years is an arbitrary and unreasonable refusal or a denial of a right or privilege of a United States national; and that the said plaintiff Wong Kwok Keung claims that the refusal of the American Consulate General at Hong Kong to recognize his claim to United States citizenship is a denial [4] of a right or privilege of a United States national;

VIII.

That the defendant is the duly appointed, qualified, and acting Secretary of State of the United States; that the plaintiffs' applications for documentation as United States citizens were denied by the American Consulate General at Hong Kong, an official executive of the defendant herein, on or about April 5, 1951; that the Department of State through its official executive at Hong Kong, did, on or about April 5, 1951, deny the plaintiffs, Wong Kwok Keung and Wong Kwok Wei, a right or privilege as nationals of the United States;

IX.

That this complaint is filed and these proceedings are instituted against the defendant under Section 503, Nationality Act of 1940 (54 Stat. 1171, 1172, 8 USC 903), for a judgment declaring the plaintiffs to be nationals of the United States;

X.

That the plaintiffs have never committed any act nor executed any instrument of expatriation nor renounced their United States citizenship; that the plaintiffs are entitled to be declared nationals of the United States;

XI.

That the plaintiff, Wong Kwok Keung, claims to be a United States citizen and/or national such citizenship and/or nationality having been acquired pursuant to the provisions of Section 1993, Revised Statutes of the United States, and that the plain-

tiff, Wong Kwok Wei, claims to be a United States citizen and/or national such citizenship and/or nationality having been acquired pursuant to the provisions of Section 1993, United States Revised Statutes, as amended by the Act of May 24, 1934, and Section 201(g) of the Nationality Act of 1940 (8 U.S.C.A. 601(g));

Wherefore, plaintiffs pray for judgment declaring them to [5] be nationals of the United States and for such other and further relief as may be just and proper.

JACKSON & HERTOGS,
/s/ By JOSEPH S. HERTOGS,
Attorneys for Plaintiffs. [6]

EXHIBIT "A"

The Foreign Service
of the
United States of America
American Consulate General,
P. O. Box No. 66,
Hong Kong, April 5, 1951.

Messrs. Wong Kwok Keung & Wong Kwok Wei,
c/o Mr. Wong Tai Ming, 101 Bonham Strand,
East, Hong Kong

Dear Sirs:

With reference to your applications for documentations to enable you to proceed to the United States, you are informed that in view of your failure to establish your identities as sons of American

citizen, the Consulate General has disapproved your applications and declines to afford you facilities for the execution of an affidavit for the purpose of traveling to the United States.

Very truly yours,

For the Consul General,
/s/ JOHN N. GATCH, JR.,
American Vice Consul. [7]

[Endorsed]: Filed Apr. 23, 1951 in U. S. District Court, Northern District. Filed July 2, 1956 in Southern District.

[Title of District Court and Cause.]

ANSWER

Comes now Dean Acheson, Secretary of State of the United States, defendant in the above-entitled action, by and through his attorneys, Chauncey Tramutolo, United States Attorney, and Edgar R. Bonsall, Assistant United States Attorney, and in answer to plaintiff's complaint admits, denies, and alleges as follows:

I.

Answering paragraph I of the complaint, defendant admits the allegations contained in paragraph I of the complaint.

II.

Answering paragraph II of the complaint, defendant admits that Wong Ho has been recognized by the Immigration and Naturalization Service as a citizen of the United States; but denies that Wong

Kwok Keung and Wong Kwak Wei are the true and lawful blood children of Wong Ho. [13]

III.

Answering Paragraph III of the complaint, defendant admits that the said Wong Ho was admitted to the United States as a citizen thereof on April 22, 1914, at San Francisco, California; that Wong Ho departed from the United States to China through the Port of Seattle, Washington on December 10, 1921 and returned at the same Port of Seattle, Washington, in December, 1931; that he departed for China through the Port of Seattle, Washington on June 2, 1934 and returned there in July, 1937. Defendant has no knowledge, information or belief as to the other allegations contained in paragraph III of the complaint, and therefore denies the same.

IV.

Answering paragraph IV of the complaint, defendant has no knowledge, information or belief as to the allegations contained in paragraph IV of the complaint, and therefore denies the same.

V.

Answering paragraph V of the complaint, defendant has no knowledge, information or belief as to the allegations contained in paragraph V of the complaint, and therefore denies the same.

VI.

Answering paragraph VI of the complaint, defendant admits that on April 5, 1951, the American

Consulate General at Hongkong, advised Wong Kwok Keung and Wong Kwak Wei that they had failed to establish their identities as sons of an American citizen and disapproved their requests for travel affidavits allowing them to come into the United States. Defendant has no knowledge, information or belief as to the other allegations contained in paragraph VI of the complaint, and therefore denies the same. [14]

VII.

Answering paragraph VII of the complaint, defendant admits that Section 1993, United States revised Statutes, as amended by the Act of May 24, 1934, and the Nationality Act of 1940, provides that a child born in a foreign country of a United States citizen parent must reside in the United States for at least five years prior to attaining the age 21 years, viz., that he must arrive prior attaining the age of sixteen years. Defendant has no knowledge, information or belief as to the other allegations contained in paragraph VII of the complaint and therefore denies the same.

VIII.

Answering paragraph VIII of the complaint, defendant admits the allegations contained in paragraph VIII of the complaint.

IX.

Answering paragraph IX of the complaint, defendant admits that the complaint herein consti-

tutes an action seeking a judgment declaring the plaintiff to be a national of the United States.

X.

Answering paragraph X of the complaint, defendant has no knowledge, information or belief as to the allegations contained in paragraph X of the complaint, and therefore denies the same. Defendant affirmatively asserts that the plaintiffs are not now and have never been citizens of the United States and are not entitled to be declared nationals of the United States.

XI.

Answering paragraph XI of the complaint, defendant has no knowledge, information or belief as to the allegations contained in paragraph XI of the complaint and therefore denies the same. Defendant specifically denies that the plaintiff, [15] Wong Kwok Keung, has acquired United States citizenship under the provisions of Section 1993 of the United States Revised Statutes of the United States; and denies that plaintiff, Wong Kwok Wei, has acquired United States citizenship under the provisions of Section 1993, United States Revised Statutes, as amended by the Act of May 25, 1934, and Section 201(g) of the Nationality Act of 1940 (8 U.S.C.A. 601(g)):

Wherefore, defendant prays that each and every relief sought by the plaintiffs be denied; that this Court declare a judgment in favor of the defendant; that plaintiffs have never been citizens or nationals of the United States; and that the defend-

ant recover his proper costs against the plaintiffs in this action.

CHAUNCEY TRAMUTOLO,
United States Attorney,
/s/ EDGAR R. BONSTALL,
By M.M.L.,
Assistant United States
Attorney. [16]

[Endorsed]: Filed July 2, 1951 in Northern District. Filed July 2, 1956 in Southern District.

[Title of District Court and Cause.]

ORDER SUBSTITUTING PARTY
DEFENDANT

The motion for substitution of party defendant in this cause coming on to be heard before the Court, and the Court being fully advised in the premises, and it appearing that the defendant, Dean Acheson, Secretary of State of the United States, has been replaced by John Foster Dulles, as Secretary of State, it is by the Court this 27th day of February, 1953,

Ordered, that John Foster Dulles, as Secretary of State, be and he is hereby substituted as party defendant in this cause in the place and stead of Dean Acheson, as Secretary of State.

/s/ GEORGE B. HARRIS,
Judge of the District Court.

[Endorsed]: Filed Feb. 27, 1953 in Northern District. Filed July 2, 1956 in Southern District.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed between the parties hereto, by their respective attorneys duly authorized, that:

1. The plaintiff, Wong Kwok Wei, shall submit to a medical and radiological examination by the United States Public Health Service at San Francisco, California for the purpose of determining the said Wong Kwok Wei's approximate age.

2. That the defendant shall deliver to counsel for the plaintiff a copy of a detailed written report of the examining doctors and radiologists.

/s/ EDGAR R. BONSALE,
Assistant United States Attorney,
Attorney for Defendant.

/s/ JOSEPH S. HERTOGE,
Attorney for Plaintiffs. [35]

[Endorsed]: Filed Feb. 21, 1952 in Northern District. Filed July 2, 1956 in Southern District, Plaintiff's Exhibit 12 Admitted Jan. 23, 1957.

[Title of District Court and Cause.]

STIPULATION FOR CHANGE
OF VENUE

It Is Hereby Stipulated that the parties and witnesses in the above entitled matter are located within the Southern District of California, Central Division, at Los Angeles, and

It Is Further Stipulated that the above entitled action may be transferred to said district and division for the convenience of parties and witnesses.

Dated:

JACKSON & HERTOGS,
Attorneys for Plaintiffs.

LLOYD H. BURKE,
United States Attorney,
By JAMES B. SCHNAKE,
Assistant United States Attorney,
Attorneys for Defendant.

So ordered:

EDWARD P. MURPHY,
United States District Judge.

Dated: June 29, 1956.

JBS:rt

[33]

Certification Attached.

[Endorsed]: Original Filed June 29, 1956.

[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITION
ON ORAL EXAMINATION

To the Plaintiffs above named and to Jackson &
Hertogs, their attorneys:

You and Each of You Will Please Take Notice
that the defendant above named will take the depo-
sition of Dr. I. S. Bergius, who resides in Hong
Kong, B. C. C. on Monday, November 5, 1956, at
10 o'clock in the forenoon of that day, before the
Vice Consul of the United States of America, at the
American Consulate General, 58 Garden Road,
Hong Kong, B. C. C., pursuant to Rules 26 and
28(b) Federal Rules of Civil Procedure.

Dated: This 5th day of October, 1956.

LAUGHLIN E. WATERS,

United States Attorney,

MAX F. DEUTZ,

Assistant United States Attorney,

Chief of Civil Division,

/s/ JAMES R. DOOLEY,

Assistant United States Attorney,

Attorneys for Defendant. [36]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 5, 1956.

United States District Court, Southern District
of California, Central Division

No. 20144-HW Civil

WONG KWOK KEUNG, and WONG HO as
Guardian ad Litem of WONG KWOK WEI,
Plaintiffs,

vs.

JOHN FOSTER DULLES, as Secretary of State,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT AS TO PLAIN-
TIF, WONG KWOK WEI

The above cause having come on regularly for trial on January 22, 1957, January 23, 1957, January 24, 1957, and February 12, 1957 in the above entitled Court, before the Hon. Harry C. Westover, Judge Presiding without a jury; the plaintiffs being represented by their attorneys, Jackson & Hertogs, by Joseph S. Hertogs, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney, Max F. Deutz and James R. Dooley, Assistant United States Attorneys, by James R. Dooley, and evidence both oral and documentary having been introduced and received on behalf of both the plaintiffs and the defendant, and the Court having considered the same; and the Court having heard the arguments of counsel, and being fully advised in the premises, now makes the

following Findings of Fact, Conclusions of Law and Judgment as to the plaintiff, Wong Kwok Wei: [38]

Findings of Fact

I.

At the time the within action was filed plaintiff, Wong Kwok Wei, claimed permanent residence within the Northern District of California; the within action having been thereafter transferred to this Court.

II.

The defendant, John Foster Dulles, is the duly appointed, qualified, and acting Secretary of State of the United States, and as such is the head of the Department of State.

III.

Plaintiff, Wong Kwok Wei, applied at the American Consulate General, Hong Kong, B. C. C. for documentation to enable him to proceed to the United States as a citizen of the United States.

IV.

Before the within action was commenced the defendant denied the aforementioned application of plaintiff, Wong Kwok Wei, for documentation. By reason of such denial, said plaintiff was denied a right or privilege as a national of the United States by the defendant upon the ground that he was not a national of the United States.

V.

Plaintiff, Wong Kwok Wei, alleges that he was

born on April 30, 1935; that he is the true and lawful blood child of Wong Ho, his alleged father; and that he acquired nationality and/or citizenship through his alleged father pursuant to the provisions of Section 1993, Revised Statutes of the United States, as amended.

VI.

The deposition of Dr. Iain S. Bergius received in evidence on behalf of the defendant, together with the radiograph annexed thereto, shows that on March 14, 1951 plaintiff, Wong Kwok Wei, was, [39] according to bone age determination, considerably younger than his claimed age. Based upon this deposition, as reinforced by the testimony of Dr. George Jacobson, called as an expert witness on behalf of the plaintiff; the Court finds that the person who purports to be Wong Kwok Wei and who applied for documentation at the American Consulate General, Hong Kong, B. C. C. was not born on April 30, 1935 as claimed, but after the latter date; and that plaintiff Wong Kwok Wei, has not sustained his burden of proving that he is the true and lawful blood son of Wong Ho; nor has said plaintiff sustained his burden of proving that the person who purports to be Wong Kwok Wei, is in truth and in fact Wong Kwok Wei.

VII.

The plaintiff, Wong Kwok Wei, had the burden of proving that he is the lawful blood son of Wong Ho, which was the burden of proof ordinarily ap-

plicable to civil actions; however, the medical testimony as to plaintiff's age has so rebutted the evidence offered on his behalf that said plaintiff has failed to sustain his burden of proof.

VIII.

The plaintiff, Wong Kwok Wei, has failed to sustain his burden of proving that he is a national or citizen of the United States.

Conclusions of Law

I.

This Court has jurisdiction of the within action pursuant to Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C.A. § 903.

II.

The burden was upon the plaintiff, Wong Kwok Wei, to [40] establish his claim to United States citizenship and/or nationality, which was the burden of proof ordinarily applicable to civil actions, and said plaintiff has failed to sustain his burden.

III.

Judgment should be entered in favor of the defendant and against the plaintiff, Wong Kwok Wei, denying the relief prayed for by said plaintiff and awarding to the defendant his costs and disbursements.

IV.

Let Judgment be entered accordingly.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

I.

That judgment be and the same is hereby entered in favor of the defendant and against the plaintiff, Wong Kwok Wei, denying the relief prayed for by said plaintiff, and awarding to the defendant his costs and disbursements. Costs taxed at \$.

Dated: This 12th day of March, 1957.

/s/ HARRY C. WESTOVER,
Judge, U. S. District Court.

Photograph attached 3/25/57 pursuant to stipulation and order of court, filed 3/22/57 & entered 3/25/57.

[Seal] JOHN A. CHILDRESS,
Clerk, U. S. District Court, Southern District of California,

/s/ By C. A. SIMMONS,
Deputy. [41]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 12, 1957. Docketed and Entered March 13, 1957.

United States District Court, Southern District
of California, Central Division

No. 20144-HW Civil

WONG KWOK KEUNG, and WONG HO as
Guardian ad Litem of WONG KWOK WEI,
Plaintiffs,

vs.

JOHN FOSTER DULLES, as Secretary of State,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT AS TO PLAIN-
TIF, WONG KWOK KEUNG

The above cause having come on regularly for trial on January 22, 1957, January 23, 1957, January 24, 1957 and February 12, 1957 in the above entitled Court, before the Hon. Harry C. Westover, Judge Presiding without a jury; the plaintiffs being represented by their attorneys, Jackson & Hertogs, by Joseph S. Hertogs, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney, Max F. Deutz and James R. Dooley, Assistant United States Attorneys, by James R. Dooley, and evidence both oral and documentary having been introduced and received on behalf of both the plaintiffs and the defendant, and the Court having considered the same; and the Court having heard the arguments of counsel, and being fully advised in the premises,

now makes the following Findings of Fact, Conclusions of Law and Judgment as to the plaintiff Wong Kwok Keung: [43]

Findings of Fact

I.

At the time the within action was filed, plaintiff Wong Kwok Keung claimed permanent residence within the Northern District of California; the within action having been thereafter transferred to this Court.

II.

The defendant, John Foster Dulles, is the duly appointed, qualified, and acting Secretary of State of the United States, and as such is the head of the Department of State.

III.

Plaintiff, Wong Kwok Keung, applied at the American Consulate General, Hong Kong, B.C.C. for documentation to enable him to proceed to the United States as a citizen of the United States.

IV.

Before the within action was commenced the defendant denied the aforementioned application of plaintiff Wong Kwok Keung for documentation. By reason of such denial, said plaintiff was denied a right or privilege as a national of the United States by the defendant upon the ground that he was not a national of the United States.

V.

Plaintiff, Wong Kwok Keung, was born at Chung

Hing Village, Toyshan District, Kwantung Province, China, on October 22, 1922.

VI.

Plaintiff, Wong Kwok Keung, is the true and lawful blood son of Wong Ho.

VII.

Wong Ho, father of plaintiff Wong Kwok Keung, is a native-born citizen of the United States. [44]

Conclusions of Law

I.

Plaintiff, Wong Kwok Keung, acquired United States nationality at birth under the provisions of Section 1993, Revised Statutes of the United States.

II.

Plaintiff, Wong Kwok Keung, is now, and ever since his birth has been a national of the United States.

III.

Plaintiff, Wong Kwok Keung, is entitled to have his nationality confirmed by an appropriate decree of this Court pursuant to the provisions of Section 503 of the Nationality Act of 1940.

Declaratory Judgment of Nationality

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged And Decreed:

I.

That the plaintiff, Wong Kwok Keung, is now,

and ever since his birth has been, a national of the United States.

II.

This Judgment is made pursuant to and under the authority of Section 503 of the Nationality Act of 1940.

Dated: This 12th day of March, 1957.

Costs Taxed \$20.00 3/15/57—No obj.

/s/ HARRY C. WESTOVER,
Judge, U. S. District Court.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 12, 1957. Docketed and Entered March 13, 1957. [45]

[Title of District Court and Cause.]

NOTICE OF APPEAL AS TO PLAINTIFF,
WONG KWOK WEI

Notice is hereby given this 10th day of April, 1957, that Wong Kwok Wei hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of this Court which was filed and entered on the 13th day of March, 1957, in favor of the defendant and against the said Wong Kwok Wei, plaintiff.

JACKSON & HERTOGS,
/s/ By JOSEPH S. HERTOGS,
Attorneys for Plaintiff.

[Endorsed]: Filed April 24, 1957. [47]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 50, inclusive, containing the original

Petition for Declaratory Relief; Answer; Stipulation dated February 21, 1952 (now exhibit 12); Order Substituting Party Defendant; Order for Change of Venue; (These are found under one cover attached to Petition)

Notice of Taking Deposition on oral examination;

Findings of Fact, Conclusions of Law & Judgment as to Wong Kwok Wei;

Findings of Fact, Conclusions of Law & Judgment as to Wong Kwok Keung;

Notice of Appeal;

Designation of Record on Appeal;

B. 3 volume of reporter's official transcript of proceedings for January 22, 1957; January 23, 1957; January 24 and February 12, 1957;

C. Plaintiff's exhibits 1 through 14, inclusive and defendant's exhibits A, B & C.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court this 11th day of July, 1957.

[Seal] JOHN A. CHILDRESS, Clerk,
/s/ By CHARLES E. JONES, Deputy.

In the United States District Court, Southern
District of California, Central Division

No. 20144-HW Civil

WONG KWOK KEUNG and WONG HO, as
guardian ad litem of WONG KWOK WEI,
Plaintiffs,

vs.

JOHN FOSTER DULLES, Secretary of State,
Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Tuesday, January 22, 1957
10 A.M.

Honorable Harry C. Westover, Judge Presiding.

Appearances: For the Plaintiffs: Joseph S. Hertogs, Esq., 580 Washington Street, San Francisco, California. For the Defendant: Laughlin E. Waters, United States Attorney; by James R. Dooley, Assistant United States Attorney. [1]*

* Page numbers appearing at top of page of Reporter's Original Transcript of Record.

The Clerk: No. 20144-HW Civil, Wong Kwok Keung and Wong Ho, as guardian ad litem of Wong Kwok Wei, vs. John Foster Dulles, Secretary of State, trial.

Mr. Hertogs: Ready for the plaintiff, your Honor.

Mr. Dooley: Ready for the defendant.

The Court: You may proceed.

Mr. Hertogs: There are two things that I would like to bring to the attention of the court, if I might. The first I just found out about fifteen minutes ago. If there is no objection on the part of the government to Mrs. Chan as interpreter, we can go ahead, but one of the parties has met Mrs. Chan's husband because they both are graduates of the same university.

The Court: Mr. Dooley has been examining the interpreters to ascertain whether or not they know any of the parties or have ever talked to them. Even if they said they did not know him, I don't think that would disqualify the interpreter.

Mr. Hertogs: I think we are going to be able to take most of the testimony in English, practically all of it, but I prefer to have the interpreter stand by and if there is any difficulty, we can use her, but I did want to explain that. [3]

In this case I am going to proceed a little differently than normal. I am going to call one of the witnesses who is a brother first. The reason for that is another brother who is to testify in this case owns and operates a grocery store in the city, and it is necessary for this first witness to replace him

at the market so he can come down here and testify. It is necessary that one of the brothers remain in the market at all times. So the first witness in this action will be Wong Kwok Foo.

The Court: Swear the interpreter.

LILY L. CHAN

being first duly sworn as interpreter, was called as a witness and testified as follows:

Direct Examination

Q. (By Mr. Dooley): Mrs. Chan, are you related to the plaintiffs in this case? A. No.

Q. Do you know the witnesses who are to appear in this case today?

A. I haven't seen them before until this morning.

Q. Have you discussed the facts of this case with anyone before the present time? A. No. [4]

Mr. Dooley: That's all.

(Witness excused.)

The Court: I will make the customary order that all witnesses be excluded except the witness who is testifying.

Mr. Hertogs: Certainly.

WONG KWOK FOO

called as a witness herein by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand and state your name, please?

The Witness: Wong Kwok Foo.

Direct Examination

Q. (By Mr. Hertogs): Mr. Wong, it is necessary for Mr. Dooley to hear you, so would you speak up rather loudly so he can hear your answers?

A. Yes, I try.

Q. Where do you live, Mr. Wong?

A. Right now I live at 3424 Edgehill Drive.

Q. Is that in Los Angeles?

A. Yes, in Los Angeles. [5]

Q. Where were you born?

A. I was born in China.

Q. In what village in China?

A. Chung Hing, China. Chung Hing Village.

Q. When did you come to the United States?

A. I came here in 1939.

Q. At the time of your arrival in 1939, were you issued a certificate of identity by the Immigration Service? A. Yes.

Q. Do you have the certificate of identity with you? A. Yes, in my pocket.

Q. May I see it, please?

A. Yes. (Handing document to Mr. Hertogs.)

Mr. Hertogs: I will ask that this be marked as the first exhibit in order for identification.

(Testimony of Wong Kwok Foo.)

The Court: It may be marked Exhibit 1.

The Clerk: Plaintiff's Exhibit 1 for identification.

(The document referred to was marked as Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Hertogs): I will show you Exhibit No. 1 for identification and ask you if that is your picture. A. Yes, that is my own picture.

Q. Is that the document that was issued to you by the Immigration Service? [6] A. Yes.

Mr. Hertogs: I will ask that it be admitted in evidence, your Honor.

The Court: It may be admitted in evidence.

The Clerk: Exhibit 1.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 1.)

Q. (By Mr. Hertogs): What is the name of your father?

A. My father's name is Wong Ho.

Q. Does he have a marriage name or another name?

A. Yes, he is known as Wong Wo Hing.

Q. Where does your father reside at the present time? A. With me at 3424 Edgehill Drive.

Q. What is the name of your mother?

A. My mother maiden name Yee Fong Yee. We used to spell it as F-e-n-g or F-o-n-g, and then Shee. The maiden name was Yee Fong Shee.

Q. Where is your mother at the present time?

(Testimony of Wong Kwok Foo.)

A. Right now she reside at Hong Kong.

Q. Where is the last place that you saw your mother?

A. That was in Chung Hing Village.

Q. When were you last in Chung Hing Village?

A. That was during the middle part of September 1949 in American calendar.

Q. Following your original arrival and admission, how [7] many trips have you made back to China?

A. Let's see. Since I have been here, just once to China.

Q. How long were you in China on that trip?

A. I arrive at home about—I would say approximately 21 months in China.

Q. At the time of your arrival at the port of entry on the first occasion, were you examined by the Immigration Service and asked a lot of questions?

A. Not too many, no.

Mr. Hertogs: I would ask at this time that the official Immigration and Naturalization Service file relating to the admission of this witness, Wong Kwok Foo, be produced by the defendant.

Mr. Dooley: For what purpose?

Mr. Hertogs: To show his prior testimony.

Mr. Dooley: That is hearsay.

Mr. Hertogs: It is always hearsay evidence when it goes to pedigree, your Honor.

The Court: If the government was trying to introduce this testimony, I would sustain an objec-

(Testimony of Wong Kwok Foo.)

tion. I have sustained an objection consistently. I don't know why you stand in any better position than the government. The government has issued the certificate of identity, and if there is anything wrong with the certificate or anything wrong [8] with the admission, the burden is upon the government to prove it. The plaintiff doesn't have to prove it is all right.

It may be that when Mr. Dooley gets through, you may be able to get the record in, but at this time I don't think the record is admissible.

Mr. Hertogs: At this time I would ask the government to produce the application for documentation filed by the plaintiffs in this action.

The Court: Just a minute. I don't think you can get the file and record, but you can require the government to produce it for your examination. If you want to do that, I will be glad to require the government to produce it.

Mr. Hertogs: Yes.

The Court: And I will be glad to have it marked for identification.

Mr. Hertogs: May we have it marked as Exhibit No. 2 for identification?

The Court: Yes, for identification.

The Clerk: 2 for identification.

(The document referred to was marked as Plaintiffs' Exhibit No. 2 for identification.)

The Court: Is this the Immigration file?

The Clerk: Yes, your Honor, of this witness.

(Testimony of Wong Kwok Foo.)

The Court: You understand I am not ruling out the Immigration file yet. [9]

Q. (By Mr. Hertogs): How many brothers and sisters do you have?

The Court: Just a minute. You have asked——

Mr. Hertogs: I will withdraw the request that it be admitted at this time. I will renew it later.

The Court: But you asked for the application, I believe, that was made.

Mr. Hertogs: I was going to ask a couple of questions first.

The Court: All right.

Q. (By Mr. Hertogs): How many brothers and sisters do you have?

A. Six brothers all together, I mean with myself.

Q. That is including yourself?

A. Yes, including myself.

Q. What is the name of your first brother?

A. My first brother's name is Wong Lun Kwong.

Q. Will you spell that, please?

A. Well, I don't know. It is so different. Lun, L-u-n, and Kwong, K-w-o-n-g.

Q. Where was he born?

A. He was born in China.

Q. In what village?

A. I believe he was born in—it was not the same village where I was born. He was born in Wong Oak Village. [10]

(Testimony of Wong Kwok Foo.)

Q. Where is he at the present time?

A. He is in Seattle, Washington.

Q. Does he have any family living in China?

A. No, he doesn't have.

Q. What is the name of your second brother?

A. My second brother is Wong Kwok Hoy.

Q. Will you spell that?

A. Kwok, K-w-o-k, Hoy, H-o-y.

Q. Where was Wong Kwok Hoy born?

A. He was born in Chung Hing Village, the same village where I was born.

Q. Where does Wong Kwok Hoy reside at the present time?

A. Right now he live here in Los Angeles.

Q. Where does he live in Los Angeles?

A. His house number is 206 West 104th Street.

Q. Is he in business in the city of Los Angeles?

A. Yes, he has a business.

Q. Where is his business located?

A. Located on 10420 South Main Street, Los Angeles.

Q. When did Wong Kwok Hoy enter the United States.

A. I believe he came here in 1933.

Q. What is the name of your third brother?

A. My third brother's name is Wong Kwok Keung.

Q. Will you spell the last one? [11]

A. K-e-u-n-g.

Q. Where was he born?

(Testimony of Wong Kwok Foo.)

A. He was born in the same village as I was born.

Q. What is the name of this village?

A. Chung Hing Village.

Q. What district in China is that located in?

A. That is located in Toy Shan.

Q. Do you know the date of his birth?

A. I don't recall the exact date. I believe he was born in 19— let's see. He was born in 1922, but the month and the day, I don't recall.

Q. Can you tell us in Chinese calendar?

A. Oh, let me see. I don't know whether he was born—either in September or— I really can't remember exactly.

Q. Where does Wong Kwok Keung live at the present time?

A. Right now he live in Los Angeles. They have a living quarter in the business at 10420 South Main Street.

Q. Does he live in the place behind the business?

A. Yes, is a living quarter.

Q. Are you referring to the business owned and operated by Wong Kwok Hoy?

A. That's right.

Q. When did Wong Kwok Keung come to the United States?

A. Let's see. It was in 1952, the early part of 1952. [12] Whether it was in February—I think around February, first part of February 1952.

Q. What is the name of your fourth brother?

(Testimony of Wong Kwok Foo.)

A. That would be myself, sir. I happen to be the fourth one.

Q. What is the name of your fifth brother?

A. Wong Kwok Wei.

Q. How do you spell that? A. W-e-i.

Q. Where was he born?

A. He was born in Chung Hing Village.

Q. That is the same village as the place of your birth? A. Yes, the same place.

Q. Do you know the date of his birth?

A. I can only give you the year, but not the exact month and day.

Q. What is the year?

A. I think it is in 1935.

Q. Can you recall the approximate month?

A. The approximate month?

Q. Either American or Chinese, if you tell us which one you are talking about.

A. I really don't know my younger brother's birth.

Q. Where does he live at the present time?

A. He also right at present living at the same place [13] with Kwok Keung. They both live there behind 10420.

Q. South Main Street?

A. South Main Street, yes.

Q. What is the name of your sixth brother?

A. My sixth brother is Wong Kwok Jin.

Q. How do you spell that?

A. I think J-i-n, they say.

(Testimony of Wong Kwok Foo.)

Q. Where was he born?

A. He born in Chung Hing Village.

Q. Where is he now?

A. Right now he is still there.

Q. By "there," you refer to Chung Hing Village?
A. Yes.

Q. There was a gentleman sitting in the court room who was taken out as a prospective witness in the case, an older person. What is the name of that person?

A. The name of the person—you mean my father, Wong Ho?

Q. Was he taken out of this court room as a witness?
A. Yes.

Q. Is he the person that lives with you?

A. Yes. He is the one who is living in my house now.

Q. Is he the father of all these brothers that you have named?
A. Yes. [14]

Q. How many times has your father been married?
A. Just once.

Q. Is your mother also the mother of these other brothers?
A. Yes.

Q. When is the first time you ever recall seeing Kwok Keung?
A. The last time?

Q. No, the first time.

A. Oh, the first time. Let's see. Since we were growing together. Is that what you mean? Way back as far as my memory, or do you mean after we separated?

(Testimony of Wong Kwok Foo.)

Q. As far as your memory.

A. As far as I remember him from very small child playing together.

Q. Did you and Kwok Keung live together until you came to the United States? A. Yes.

Q. Did you both identify the same person as your mother? A. Oh, yes.

Q. Were you in Chung Hing Village at the time of the birth of Kwok Wei?

A. Yes. I was home then, yes.

Q. Do you remember the birth of Kwok Wei?

A. I remember the occasion, but not the—of course, the exact—I mean the circumstances. I was just a small boy then. No, I don't remember any outstanding things to point out, I don't.

Q. Do you remember a child being raised in your home?

A. Yes, being born in our house, but that is about all I can say.

Q. Is the boy who is here in the United States at the present time the same person as that child who was born in your home?

A. Yes, as far as my own recognition, yes, I recognize him, yes.

Mr. Hertogs: At this time I would ask that the defendant produce the passport application file of the plaintiffs herein.

(Mr. Dooley handing documents to Mr. Hertogs.)

Mr. Hertogs: May we have this marked as plain-

(Testimony of Wong Kwok Foo.)

tiffs' exhibit next in order for identification, your Honor?

The Court: It may be marked Exhibit 3 for identification.

The Clerk: Exhibit 3.

(The exhibit referred to was marked as Plaintiffs' Exhibit No. 3 for identification.)

Q. (By Mr. Hertogs): I will show you in Plaintiffs' Exhibit No. 3 for identification a passport application [16] executed before the American Consulate General at Hong Kong on March 5, 1951, and ask you if you can identify the picture on the reverse side of that application.

A. Yes, that is Kwok Wei.

Q. Who is Kwok Wei?

A. That is my brother, my sixth brother.

Q. Is that the person that was born in your home in China? A. Yes.

Q. Who is the mother of that child?

A. Yee Fong Yee.

Q. Who is Yee Fong Yee?

A. My mother.

Q. Is she also the wife of Wong Ho?

A. Yes.

Q. Your father? A. Correct.

Q. I will also show you a picture contained on the reverse side of the application executed at the office of the American Consul General, Hong Kong, May 24, 1951, which is likewise contained in Plaintiffs' Exhibit No. 3 for identification. I will ask you if you can recognize that photograph.

(Testimony of Wong Kwok Foo.)

A. Yes. That is Wong Kwok Keung, my third brother.

Q. That is your third brother? [17]

A. Yes.

Q. I will also show you some pictures——

Mr. Dooley: Your Honor, if the plaintiff is going to offer any particular portions of the passport file in evidence before questioning the witness concerning it, I think it is proper procedure that the documents be offered or received in evidence before questioning the witness concerning them.

The Court: Not necessarily. All he has asked is to identify the pictures. He has identified the pictures. He can do that without introducing the file. Are you willing to admit that the application was made and denied?

Mr. Dooley: Yes, your Honor.

The Court: That is one of the things the plaintiff has to prove, that he made an application and there was a denial. Sometimes we don't admit that, but you are willing in this case to admit that there was an application and a denial?

Mr. Dooley: Yes, your Honor. I don't know what portions of the passport file Mr. Hertogs intends to introduce in evidence. In order to keep the record straight, perhaps each document he shows the witness should be marked separately so that the court can pass upon the admissibility of the various documents as he offers them.

The Court: Mr. Dooley, if I remember correctly, in [18] other cases you have had certain parts or

(Testimony of Wong Kwok Foo.)

certain sheets of the file marked for identification and then you have introduced them without introducing the entire file.

Mr. Dooley: I was suggesting that Mr. Hertogs do that, that if he has a document he refers to, it be marked separately so I can follow just what he is referring to, as well as the court.

Mr. Hertogs: Your Honor, I have no objection to the entire file going into evidence except for those things which are opinions or conclusions of administrative officers. Outside of that, there is so much evidence in this file that I am going to have to use a tremendous amount of it.

The Court: If there is any hearsay testimony in there, I will disregard it.

Mr. Hertogs: All right.

Mr. Dooley: I was thinking, your Honor, the defendant has no objection to the file being opened and the plaintiff taking those particular portions that are admissible out so that the exhibits can be arranged in an orderly fashion to present the picture to the court, and the court can pass on the admissibility of each one as it is offered. It eliminates confusion in my mind because as he refers to a picture, the Court of Appeals will have to search to find just what picture he is referring to, so the defendant has no objection to the seal being broken and Mr. Hertogs utilizing whatever [19] documents in there that are admissible for his particular purpose.

Mr. Hertogs: That's all right with me. I don't

(Testimony of Wong Kwok Foo.)

want to break the seal. Will Mr. Dooley break the seal?

The Court: Let Mr. Dooley do it and he can be blamed if there is any blame attached to the breaking of the seal.

Mr. Dooley: Let the record show that the passport file relating to Wong Kwok Keung and Wong Kwok Wei is being opened and the seal is being broken.

The Court: To clarify the record, counsel, which of the children by numbers are the plaintiffs in this case?

Mr. Hertogs: The plaintiffs are No. 3 and No. 5, your Honor.

We have had the entire State Department file marked as No. 3 for identification, your Honor. In view of the objections on the part of counsel for the government, I think we should just leave that entire file marked as 3 for identification, but it will not be made a part of the record since it is being broken open. I would ask that the application for passport which was executed in the case of Wong Kwok Wei at the American Consulate General in Hong Kong on the 5th of March, 1951, where the picture was shown to the witness, be introduced in evidence as Plaintiffs' exhibit next in order.

The Court: Why not make it 3-A? [20]

Mr. Hertogs: All right, your Honor.

The Court: Make it 3-A, and then it refers back to the entire file. Exhibit 3-A in evidence.

The Clerk: Exhibit 3-A.

(Testimony of Wong Kwok Foo.)

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit No. 3-A.)

Mr. Hertogs: I would ask that the passport application filed with the American Consulate General in Hong Kong in the case of Wong Kwok Keung, which is dated May 24, 1951, which was previously shown to this witness, be admitted in evidence as Plaintiffs' Exhibit 3-B.

The Court: It may be admitted in evidence.

The Clerk: Exhibit 3-B.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 3-B.)

The Court: I notice, counsel, on 3-A there is a memorandum, "Applicant will be 16 years old on April 30, 1951, and must be in the United States before that date or he will lose his claim to American citizenship," and so forth.

I suppose that was why these two boys were admitted?

Mr. Hertogs: No, your Honor. He came after the deadline.

The Court: He came after the deadline?

Mr. Hertogs: Yes, your Honor.

The Court: Both of them did? [21]

Mr. Hertogs: Yes, your Honor.

The Court: Don't you think the record should show in this case, and the files may also show, that this case was originally filed in San Francisco because of the residence of the father?

(Testimony of Wong Kwok Foo.)

Mr. Hertogs: I thought we would cover it when the father is on the stand.

The Court: All right.

Mr. Hertogs: At this time I would ask the government to stipulate, so it won't be necessary to introduce other parts of Exhibit No. 3 for identification, the fact that both the plaintiffs herein, Wong Kwok Keung and Wong Kwok Wei, were denied passports and documentation by the American Consulate General at Hong Kong prior to the filing of this action, and, more specifically, that counsel was informed of the Department of State action on May 2, 1951, and that the plaintiffs herein were informed of such denial by the American Consulate General at Hong Kong under date of April 5, 1951?

Mr. Dooley: I will stipulate that the plaintiffs were informed of that action on April 5, 1951.

The Court: And that there was a denial?

Mr. Dooley: And that there was a denial, yes, your Honor.

The Court: May I inquire, there was a denial in [22] this case and then the action was filed?

Mr. Hertogs: That is correct, your Honor.

The Court: Then there evidently must have been a change of heart because the plaintiffs were allowed to come to this country.

Mr. Hertogs: They came in on certificates of identity. These were some of the earlier cases.

The Court: Didn't they make the application

(Testimony of Wong Kwok Foo.)

first for certificate of identity to come over and prosecute the case?

Mr. Hertogs: Following the normal procedure, your Honor, after the rejection of the application for issuance of a passport by the American Consulate General on April 5, 1951, we were informed of such action, and this suit was commenced in the United States District Court in San Francisco. Following the regulations which were promulgated under Section 503, certified copies of the complaint were served upon the Department of State in Washington, D. C., and certified copies of the complaint were forwarded to the American Consulate General at Hong Kong.

Thereafter, both of the plaintiffs in this action were called to the American Consulate General to file applications for issuance of certificates of identity which would permit them to proceed to this country solely for the purpose of appearing and testifying as witnesses. [23]

Thereafter the Department of State instructed the American Consulate General at Hong Kong to issue such certificates of identity permitting them to proceed to this country for that purpose.

I have the certificates of identity and I intend to introduce them as evidence in this case when the plaintiffs are on the stand as the documents that they had in order to obtain admission to the United States.

They are admitted in a kind of a hybrid status during the outcome of this proceeding. They are

(Testimony of Wong Kwok Foo.)

not admitted as aliens. They are not admitted as citizens. They are admitted just as plaintiffs in this action until there is a determination of citizenship or an adverse determination of citizenship by this court, and they are here under bond at the present time.

At this time, now, I would ask that the certificate of identity No. 14761, issued by the Immigration Service at San Francisco on April 28, 1954, to Wong Ho, be marked as plaintiffs' exhibit next in order for identification.

The Court: Exhibit 4 for identification.

The Clerk: Exhibit 4 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 4 for identification.)

Q. (By Mr. Hertogs): I will show you Plaintiffs' Exhibit 4 for identification, and I will ask if you recognize [24] the picture of the individual contained therein.

A. Yes. This is my father, Wong Ho.

Q. Is that the person that is residing with you today? A. Yes.

Q. Is he also the father of Wong Kwok Keung?

A. Yes.

Q. Is he also the father of Wong Kwok Wei?

A. Yes.

Mr. Hertogs: I will ask that a photograph of four individuals, which is contained in Plaintiffs' Exhibit 3 for identification, be marked as Plaintiffs' Exhibit No. 3-C for identification.

The Court: It may be marked for identification.

(Testimony of Wong Kwok Foo.)

The Clerk: 3-C.

(The photograph referred to was marked as Plaintiffs' Exhibit No. 3-C for identification.)

Q. (By Mr. Hertogs): I show you Exhibit No. 3-C for identification and ask you if you recognize any of the persons therein. A. Yes.

Q. I will ask you to name those persons from left to right, starting over here with this person at the left-hand side in the white shirt.

A. That is myself, Wong Kwok Foo.

Q. Then identify the male person in the back in the [25] middle of the picture.

A. That is my father, Wong Ho.

Q. Is that the person that is here in the court room today? A. Yes.

Q. Who is the person directly in front?

A. This is my mother, Yee Fong Shee.

Q. I will show you the one off on the right-hand side in the white shirt, and who is that?

A. Wong Kwok Keung, my third brother.

Q. Is that the person who is a plaintiff in this action? A. Yes, he is one of them.

Q. Is that the person who is presently residing with Wong Kwok Hoy at 10420 South Main Street in Los Angeles? A. Yes.

Q. Can you tell us approximately when that picture was taken?

A. I think that picture must have been taken in 1934. I think my memory goes back—yes, 1934.

Q. Do you remember where it was taken?

(Testimony of Wong Kwok Foo.)

A. Yes. It was at Canton City. Some persons might call it Kwangtung.

Mr. Hertogs: I will ask it be admitted in evidence, your Honor.

The Court: It may be received in evidence. [26]

The Clerk: Exhibit 3-C.

(The picture referred to was received in evidence and marked as Plaintiffs' Exhibit No. 3-C.)

Mr. Hertogs: So we can keep No. 3 all together, your Honor, rather than spread it out, I will ask at this time that a small photograph contained in Exhibit 3 for identification be marked as Exhibit 3-D for identification.

The Court: It may be marked.

The Clerk: 3-D for identification.

(The photograph referred to was marked as Plaintiffs' Exhibit No. 3-D for identification.)

Mr. Hertogs: I will ask that a small photograph containing about 13 individuals, which comes from the State Department file, be marked as 3-E for identification.

The Court: It may be marked 3-E for identification.

The Clerk: 3-E for identification.

(The photograph referred to was marked as Plaintiffs' Exhibit No. 3-E for identification.)

Mr. Hertogs: I am sorry to take so much time, your Honor, but I haven't seen this file before.

I will ask that a Lingnan University student card be marked as 3-F.

(Testimony of Wong Kwok Foo.)

The Court: 3-F for identification.

The Clerk: 3-F. [27]

(The document referred to was marked
Plaintiffs' Exhibit No. 3-F for identification.)

Mr. Hertogs: I will ask that a letter of Lingnan University dated January 14, 1950, be marked 3-G for identification.

The Court: It may be marked.

The Clerk: 3-G for identification.

(The document referred to was marked
Plaintiffs' Exhibit No. 3-G for identification.)

Mr. Hertogs: I would ask that all of the remaining papers which were contained in an envelope attached to and made a part of the State Department file be marked as Plaintiffs' Exhibit 3-H for identification.

The Court: It may be marked.

(The documents referred to were marked
Plaintiffs' Exhibit No. 3-H for identification.)

Mr. Dooley: I object to marking the documents in toto, because the court will have to pass upon each one separately as to their admissibility or weight.

Mr. Hertogs: I don't think it goes to the weight. It may go to the admissibility. I don't know what is in here without taking a long time to study it.

The Court: Let's mark it generally. They are in an envelope. Let's mark that 3-H for identification and at the recess you can look it over, and if you want anything [28] more out of it, you can ask.

(Testimony of Wong Kwok Foo.)

Mr. Hertogs: Or if there is any objection, he can object specifically.

The Court: The envelope may be marked, and its contents, as 3-H for identification.

The Clerk: 3-H has been marked.

Q. (By Mr. Hertogs): I will show you Plaintiffs' Exhibit No. 3-E for identification and ask if you have seen any of those people before.

A. Yes, by all means, yes.

Mr. Hertogs: It will be rather difficult to identify them. If there is no objection on the part of counsel, I would suggest we make a little number over each picture. I think that is the only way we are going to keep track of these persons. Don't you think so, Mr. Dooley? Or don't you want to deface the picture?

Mr. Dooley: It doesn't make any difference. You can place a number there.

Q. (By Mr. Hertogs): Do you know the person directly under No. 1? A. Yes.

Q. Who is that?

A. Wong Kwok Keung, my third brother.

Q. Do you know the person directly under No. 2?

A. Yes. That is myself, Wong Kwok Foo. [29]

Q. Who is the person directly under No. 3?

A. That is Kwok Hoy, that is No. 2 brother.

The Court: No. 2 brother?

The Witness: Yes, my No. 2 brother.

Q. (By Mr. Hertogs): Is that the boy who lives in Los Angeles?

(Testimony of Wong Kwok Foo.)

A. Yes, right now he is living in Los Angeles, yes.

Q. Who is the person directly under No. 4?

A. This is my wife.

Q. Where is your wife at the present time?

A. Right now living here in Los Angeles.

Q. Who is the person down at No. 5 there?

A. That is my first child, my boy, my son.

Q. And No. 6, the person right here to the right of No. 6, who is that? A. Kwok Keung's wife.

The Court: That is what brother's wife?

The Witness: The No. 3 brother's wife.

Q. (By Mr. Hertogs): And the person directly under No. 7?

A. That is the younger of my brothers, that is Kwok Jin.

The Court: Which one is that?

The Witness: That would be the last one.

The Court: No. 6? [30]

The Witness: The youngest one, yes.

Q. (By Mr. Hertogs): Who is the person directly under 8 there?

A. That is my mother, Yee Fong Shee.

Q. There is a little boy where we have got a No. 9. A. Yes.

Q. Who is that?

A. That is Kwok Keung's son, the son of Kwok Keung, the No. 3 brother.

Q. Who is the person just to the left of No. 10 there, that woman over there?

A. That is Kwok Hoy's wife.

(Testimony of Wong Kwok Foo.)

Q. And where is Kwok Hoy's wife?

A. Living here in Los Angeles.

The Court: Which brother was that?

The Witness: That would be No. 2 brother, Kwok Hoy.

Q. (By Mr. Hertogs): There is a child with 11 there. A. Yes.

Q. Who is that?

A. That is Kwok Hoy's son, the No. 2 brother, son of Kwok Hoy.

Q. Where was that picture taken?

A. Where was it taken?

Q. Yes, where? [31]

A. That was in our village.

Q. In Chung Hing Village?

A. Yes, right, Chung Hing Village.

Q. When was it taken?

A. Oh, I would say approximately, just shortly before my departure from the Chung Hing Village to make my trip back here to the United States.

The Court: What year?

The Witness: I would say 1949, the spring.

Q. (By Mr. Hertogs): About the spring of 1949?

A. Yes. I think picture was taken about spring-time 1949.

The Court: That shows 1, 2 and 6th brothers, is that right?

Mr. Hertogs: No.

(Testimony of Wong Kwok Foo.)

Q. What brothers are in there? No. 1, who is that?

The Court: That is No. 1 brother, isn't it?

Q. (By Mr. Hertogs): Who is under the No. 1?

A. That is Kwok Keung, No. 3 brother.

The Court: Oh, that's No. 3?

The Witness: Yes.

Mr. Hertogs: And under No. 2?

The Witness: Myself, Kwok Foo.

Q. (By Mr. Hertogs): And No. 3?

A. That is Wong Kwok Hoy, No. 2 brother. [32]

Q. There is one more brother in here.

The Court: No. 7.

The Witness: That is Wong Kwok Jin, the youngest one. That is No. 6 brother.

Q. (By Mr. Hertogs): Is that all the brothers?

A. Here under No. 12 is Kwok Wei, which you didn't ask me.

The Court: Which one is that?

The Witness: That would be No. 5 brother, one of the plaintiffs.

Mr. Hertogs: We missed one, your Honor.

The Witness: You numbered it 12.

Q. (By Mr. Hertogs): Is he in the United States? A. Yes.

Q. Is he the boy that is here this morning in the court room? A. Yes.

Mr. Hertogs: I will ask that this be admitted in evidence, your Honor.

The Court: It may be admitted in evidence.

The Clerk: Exhibit 3-E in evidence.

(Testimony of Wong Kwok Foo.)

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit No. 3-E.)

Mr. Hertogs: I will ask that the certificate of identity issued by the American Consulate General at Hong Kong on January 21, 1952, to Wong Kwok Keung be marked as plaintiffs' exhibit next in order for identification.

The Court: It may be marked Exhibit 5.

The Clerk: 5 for identification.

(The document referred to was marked as Plaintiffs' Exhibit No. 5 for identification.)

Mr. Hertogs: I might state for the record, your Honor, there is attached and made a part of that certificate of identity form I-94(c), which is an official Immigration and Naturalization Service form showing arrival and the action taken in connection therewith. I will ask that the certificate of identity issued by the American Consulate General in Hong Kong, January 28, 1952, to Wong Kwok Wei, be marked as Plaintiffs' Exhibit No. 6 for identification.

The Court: It may be marked.

The Clerk: Exhibit 6 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 6 for identification.)

Mr. Hertogs: I will ask that the Hong Kong Crown Colony identity card issued to Wong Kwok Keung, which contains a picture on page 2 thereof, be marked as plaintiffs' exhibit next in order for identification.

The Court: Exhibit 7 for identification.

(Testimony of Wong Kwok Foo.)

The Clerk: Exhibit 7 for identification. [34]

(The document referred to was marked
Plaintiffs' Exhibit No. 7 for identification.)

Mr. Hertogs: I will ask that the Hong Kong Crown Colony identification card issued to Wong Kwok Wei, page 2 thereof, which contains a picture, be marked Plaintiffs' Exhibit 8 for identification.

The Court: It may be marked.

The Clerk: 8 for identification.

(The document referred to was marked
Plaintiffs' Exhibit No. 8 for identification.)

Q. (By Mr. Hertogs): I show you Plaintiffs' Exhibit No. 5 for identification and ask you if you recognize a photograph of the person at the bottom thereof. A. Yes.

Q. Who is that?

A. That is Wong Kwok Keung.

Q. I will show you Plaintiffs' Exhibit No. 6 for identification and ask you if you recognize the photograph of the person at the bottom thereof.

A. Yes. That is Wong Kwok Wei.

Q. I show you Plaintiffs' Exhibit No. 7 for identification and ask you if you recognize the picture of the person contained on page 2 thereof.

A. Yes, Kwok Keung.

Q. I show you Plaintiffs' Exhibit No. 8 for identification [35] and ask you if you recognize the picture contained on page 2 thereof.

A. Yes, that is Wong Kwok Wei.

The Court: Mr. Hertogs, I notice it is pretty

(Testimony of Wong Kwok Foo.)

near 11:00 o'clock. We will take our morning recess now. We will recess until 10 minutes after 11:00.

Mr. Dooley: Your Honor, the deposition hasn't been opened, and I would like to request that the deposition be unsealed.

The Court: The deposition may be opened and the parties may look at it.

Mr. Dooley: Also, I would like to request that it be taken, along with Mr. Hertogs, up to the Public Health Service, because I want to take a look at it through an instrument that they have up there.

Mr. Hertogs: We will need a shadow box to see it.

The Court: All right. Then you will go with him?

Mr. Hertogs: I have no objection. We won't have time now, but maybe at noon we can do it. We will make some arrangements between ourselves, your Honor.

The Court: All right. Court will now stand in recess until 10 minutes after 11:00.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Hertogs): I will show you a picture contained [36] in Plaintiffs' Exhibit No. 2 for identification and ask you if you recognize that picture.

A. Yes. It is myself, Wong Kwok Foo.

Q. At the time you testified at the Immigration

(Testimony of Wong Kwok Foo.)

and Naturalization Service, Seattle, Washington, in 1939, did you claim that you had a brother known by the name of Wong Kwok Keung?

A. Yes, I did.

Mr. Dooley: I object, your Honor, on the ground that the question calls for a self-serving statement and is hearsay.

The Court: Overruled.

Q. (By Mr. Hertogs): At the same time did you claim that you had a brother known as Wong Kwok Wei? A. Yes.

Q. When you testified in 1939 and you stated you had a brother known as Wong Kwok Keung, were you referring to the person who was sitting in this court room this morning? A. Yes.

Mr. Dooley: Your Honor, may I have a continuing objection on what he testified to in 1939?

The Court: You may have a continuing objection, and the same ruling.

Q. (By Mr. Hertogs): When you testified in 1939 concerning your brother known as Wong Kwok Wei, were you referring to [37] the other boy that was sitting in this court room this morning?

A. Yes.

Q. At the time you were examined following your arrival in Seattle, Washington, in 1939, were you questioned by officers of the Immigration and Naturalization Service concerning your age, inasmuch as it appeared that you might be younger than claimed?

A. I believe they did have that impression, yes.

(Testimony of Wong Kwok Foo.)

Well, they just say I look so small for the age 16, Chinese age. I mean that was the statement I remember.

Mr. Dooley: I object to the witness saying what someone said in 1939, your Honor, as being hearsay.

The Court: It may go out.

Mr. Dooley: Immaterial and irrelevant.

The Court: It seems to me you are trying to anticipate Mr. Dooley's defense. Maybe he won't use that.

Mr. Hertogs: That was the only basis for objection to documentation in Hong Kong, so I have to presume it is the only thing in this case.

The Court: Mr. Dooley doesn't always see eye to eye with them.

Mr. Hertogs: I happened to see that at recess, your Honor. Then I have no further questions of this witness.

The Court: Mr. Dooley, do you want to defer your [38] cross examination until after the other witness has testified?

Mr. Dooley: Yes, although I understand Mr. Hertogs wanted this particular witness to be able to go, so I will commence his cross examination.

The Court: All right.

Mr. Hertogs: The others I have no objection to whatever Mr. Dooley wants to do in that regard, your Honor.

The Court: Mr. Dooley is trying to accommodate your witness.

(Testimony of Wong Kwok Foo.)

Mr. Hertogs: Yes, he is being very nice about it.

The Court: Mr. Dooley is very nice except he just won't give up.

Mr. Hertogs: He is in a rather bad predicament, your Honor, because he has his instructions.

Cross Examination

Q. (By Mr. Dooley): Mr. Wong, how old were you when you came to the United States in 1939?

A. In 1939 I was 16 Chinese calendar, because I had no American knowledge then.

The Court: May I ask you, is your American age the same as your Chinese age?

The Witness: No. I would be—if I was 16 at that particular month, I would be just about not quite 15 in [39] American then.

The Court: Not quite?

The Witness: Not quite, but it varies in different years, you know.

The Court: I know it does, so I was wondering about it.

The Witness: I was actually a little less than 15, I think, at the time.

The Court: But 16 was the Chinese calendar?

The Witness: 16 was the Chinese calculation.

Q. (By Mr. Dooley): What was the date of your birth?

A. I was born September 18, 1923. That is in the American calendar.

The Court: Can you give us the CR date?

The Witness: The Chinese Republic date?

(Testimony of Wong Kwok Foo.)

The Court: Yes.

The Witness: That would be in Chinese in CR 12, the 12th year of the Chinese Republic.

The Court: What month?

The Witness: The month would be 8, and also the 8th day.

The Court: Before you came to the United States, you lived in China?

The Witness: Yes.

The Court: You had gone to school in China?

The Witness: Yes.

The Court: Did you have any hesitancy in giving the CR date when you came to the United States?

The Witness: Well, you mean, well, of course, since I have been living here, I always go by the American calendar more than the CR date.

The Court: Now, when you give the CR date, you have to take the American date and subtract, is that it, and figure up the CR date?

The Witness: Yes, that's right. I am not too familiar with the CR date any more. I am familiar with the so many years instead of the CR date.

Q. (By Mr. Dooley): How old was your No. 1 brother when you came to the United States in 1939? A. You mean how old was he then?

Q. Yes.

A. Well, I only know his—he is 44 now in Chinese age, but I wouldn't exactly—no reason for me to remember how old he was when I came here. If

(Testimony of Wong Kwok Foo.)

you want me to, I just have to subtract that to figure it out, that's all.

Q. How much older was he than you when you came to the United States in 1939?

The Court: Let's put it this way. How much older is he than you at the present time? There hasn't been any change, has there? [41]

Mr. Dooley: No, your Honor.

The Witness: It would be — say 10 years, approximately—not by a 12-month calculation. I would say he is 10 years older than myself. That is just mathematical, not the days and the months. The equivalent might vary.

Q. (By Mr. Dooley): What was the date of his birth?

A. I really don't recall his date of birth.

Q. Do you recall the year in which he was born?

The Court: Mr. Dooley, here is the younger brother. You are asking him to recall the year he was born. He couldn't possibly recall that except through hearsay.

The Witness: Yes.

The Court: Somebody had to tell him. His father might be able to testify to when he was born or the mother, but a younger son can't except by reputation.

Mr. Dooley: I was thinking, your Honor, dates of birth come within the pedigree rule, and he could testify to any member of the family, if he can.

(Testimony of Wong Kwok Foo.)

The Court: Do you know when your first brother was born, the day and date?

The Witness: No, not the day and date. I can just say he was probably born in CR——

The Court: The only thing you are doing is figuring it out, you are figuring the date by arithmetic.

The Witness: Yes. [42]

The Court: You don't know when he was born, do you?

The Witness: No, I can't recall when he was born and I have no reason to know when he was born. You asked me the question.

Q. (By Mr. Dooley): Your mother never told you when he was born?

A. No particular reason for me to remember. She might have told me or my father might have told me, or on a certain occasion I might say, "How much is my older brother older than myself?" I didn't certainly remember it for any reason at all.

Q. Your No. 2 brother, do you remember his date of birth from reputation in your family?

A. Yes. That one I happen to remember. I sort of happen to, you know, by accidentally. He was born in 1914. I wouldn't know the CR date, either, because we just happen to have a conversation and the date was so coincide with, you know, the first war, and all that, and we just happened to have that in a conversation.

Q. How much older is he than you?

A. He would be approximately nine years, then,

(Testimony of Wong Kwok Foo.)

by figuring. He could be just about in that order.

Q. Your No. 3 brother, do you remember his birth date by reputation or in the family? [43]

A. I feel he only born a year before me. I think he was born around September, but I am not definite about it.

The Court: What year?

The Witness: 1922, just a year before myself. He is just about a year older than myself.

The Court: On direct examination you didn't tell us when you were born. When were you born?

The Witness: I was born September 18, 1923.

Q. (By Mr. Dooley): You are the No. 4 son, is that correct? A. Yes.

Q. No. 5 brother, do you remember his birth date?

A. I remember the year so plainly. He was born in 1935. Whether it was in April or May, I don't know. I really don't.

The Court: 1935?

The Witness: Yes.

The Court: Then he is considerably younger than you.

The Witness: Yes.

The Court: How many years younger?

The Witness: Say eight years, say. He was 35. It would be slightly more than that, say 12 years.

The Court: Mr. Dooley, let's get the No. 6 boy while we are here. [44]

Q. (By Mr. Dooley): The No. 6 boy, do you remember his birth date?

(Testimony of Wong Kwok Foo.)

A. Not the month and year. I remember the year he was born.

The Court: What year?

The Witness: He was born in 1937.

Q. (By Mr. Dooley): Were you in the Chung Hing Village at the time No. 5 boy was born?

A. Yes, I was there then, yes.

Q. Do you remember the birth?

A. Not the date. I remember a brother is added to our family.

Q. At first you testified he was eight years older than you, and then you changed it to 12. Do you remember how old you were at the time No. 5 boy was born?

A. I am quite sure I was older than eight. It would be about, just about 11 or 12 years. I mean that is just by memory, which you are asking me the time. When I first give you eight years old, it was mathematical error, I would say.

Q. You were just figuring it out mathematically when you gave eight? A. Yes.

Q. And you are figuring it out mathematically when you give 12?

A. No. Then I go back a little further when I had a [45] moment to think a bit, and I think I must really remember something when I was either 11 or 12, but before, when I was 10 years old, I don't think I remember too much prior to my 10th year of age. I know I was probably about 12 years old.

(Testimony of Wong Kwok Foo.)

Q. Do you remember what time of the day your No. 5 brother was born?

A. No, I don't recall the specific time, no.

Q. Who was living in the family home at the time your No. 5 brother was born?

A. Well, let's see. Kwok Keung was home and Kwok Foo, myself, and, let's see, our older brother is home. I don't know whether he is at home or not at the moment when the No. 5 brother was born. I mean he is still in China, the older brother. He was still in China then.

Q. You don't know where the older brother was? You don't know whether he was in the village or not at the time? A. That's right.

Q. You say you were there? A. Yes.

Q. Who else was there? I didn't get the names.

A. Kwok Keung was also home, the No. 3 brother, Kwok Keung, myself, and, naturally, my father is there, too.

Q. Was there anyone else living in the family home at that time?

A. No, not to my memory. [46]

Q. You didn't have any relatives other than your brothers there?

A. Present in the house at the certain event, you mean?

Q. No, who were living in the house.

A. No, nobody else, no, just my father, mother and both brothers and the older brother. No, no other relative.

(Testimony of Wong Kwok Foo.)

Q. When you came to the United States in 1939, how old was Kwok Wei at that time?

A. I would say approximately just a small kid, five years old.

Q. Five years of age? A. Yes.

Q. When you went back to China in 1949, how old was Kwok Wei?

A. I went back in 1947. I returned in 1949. I went back to China in 1947.

Q. When you went back in 1947, how old was Kwok Wei? A. He was 13 or 14.

Q. Between 1939 and 1947, did Kwok Wei correspond with you or write to you?

A. Let me think. No, he didn't, no.

Q. Between 1939—withdraw that.

When you came into the United States in 1939, how old was Kwok Keung? [47]

A. Then he was 17.

Q. When you returned, how old was he?

A. I think he was 26. When I returned, he was 26, I believe, yes.

Q. Between 1939 and 1947, did Kwok Keung write to you? A. Yes, he did.

Q. How often did he write to you?

A. Of course, that was many years during the war, between 1939 to 1947, and I certainly did receive some letters from him, say, before Pearl Harbor, and after 1940, then we did our correspondence occasionally, but after the war was over, I corresponded with him more often. I would say 1946 I wrote to him quite a few times. Of course, during

(Testimony of Wong Kwok Foo.)

1942 and 1943 and those times, the mail service wasn't so regular, so we didn't correspond very often. I can't even recall whether I done it once or twice, maybe.

Q. He wrote to you after the war and before 1947? A. Yes.

Q. Do you have any of those letters that you received from Kwok Keung after the war and before 1947?

A. No, I don't think so, unless I have to go home and look for it. I do keep some old mail, too, but not for specific reasons, so I look for it for you—I don't know whether I have any or not. I can't say I have.

Q. Where did you attend school, Kwok Foo?

A. Did you say when or where?

Q. Where and when did you attend school?

A. I attended school in China the first nine years, Chinese teaching in China, and the next village from Chung Hing Village, the school is located.

Q. What was the name of the village?

A. It is known as Bak Chung, B-a-k C-h-u-n-g, and that is equivalent to white window. There is no formal translation for that particular name because it is only done in Chinese character, the name of the school which represent the village, but I would say in my own translation now it is B-a-c-k and C-h-o-n-g.

Q. That was also the Bak Chung School?

A. Yes.

(Testimony of Wong Kwok Foo.)

Q. It was in Bak Chung Village?

A. Yes, it is in our regular—yes, in our regular conversation, yes. I don't know whether there is any other name. I don't know. Somehow in China some villages are known as an X name or the familiar landmark, so evidently the name that remind me is Bak Chung, because the windows in that particular village are white, so if there is any formal name or official name, I don't know.

Q. How far was Bak Chung Village from Chung Hing Village?

A. Within walking distance. Let's see. We generally [49] walked through a narrow, you know, a narrow walk in between the rice field, so it would be—I would say it would take about 10 minutes, maybe, when I travel to school from my house, maybe 10 minutes. Of course, during the winter time, you can take the shortcut without destroying the rice field. Of course, then you walk diagonally. It could be shorter cut. I would say about 10 minutes walking distance.

Q. Did Wong Kwok Keung go to school with you?

A. Yes, for a number of years we attended school together.

Q. And you went to Bak Chung school for nine years? A. Yes.

Q. Who started school first, you or Wong Keung?

A. Keung started a year earlier than myself.

(Testimony of Wong Kwok Foo.)

Q. Is that the only school you attended in China, is Bak Chung school?

A. Yes, that is the only one I have attended, yes.

Q. When you left China to come to the United States in 1939, was Kwok Keung still attending Bak Chung school?

A. Our school term always ends toward the end of the last month in Chinese calendar, you know, or Chinese new year, so he ended it and I ended it, but after the new year I left the village, so whether Kwok Keung returned to Bak Chung school or not, I don't recall, because there was just a short time.

I heard that he went from the village to Macao, you know, after my departure from Hong Kong for the United States, so I don't recall, but I just point out we both end the term at the very end of 1939, and then I left the village in 1939.

Q. Have you ever been to Canton City, Mr. Wong?

A. Yes. I make a trip there, of course, on my way—do you mean all together, or you just want me the very first trip?

The Court: Any time.

The Witness: Any time all together?

The Court: Yes.

The Witness: Yes, I would say—let's see. First, I went there once with my—with Kwok Keung and both of my parents, which is considered a vacation, and then when I left the village for Hong Kong, that was the time we didn't have to go to Canton.

(Testimony of Wong Kwok Foo.)

I would say in different occasions I have been through or to Canton three times, I put it that way. But, of course, only once that Kwok Keung was with me.

Of course, on my trip back to China, I also met Kwok Keung in Canton City, too, and so naturally you would say my presence at Canton City would be—yes, Kwok Keung was also present.

Q. (By Mr. Dooley): Have you ever been to Canton City with Kwok Wei?

A. No, I never did. [51]

Q. Have you ever been to Canton City when Kwok Wei was in Canton City?

A. No, I don't recall Kwok Wei ever been to Canton City or not. If he did, I don't know about it.

Q. I show you Plaintiffs' Exhibit 3-E. You have testified, I believe, that that photograph representing Plaintiffs' Exhibit 3-E was taken during the last trip to China, is that correct?

A. Yes. I say shortly before my departure from China.

Q. You departed from China in 1949?

A. Yes.

Q. Do you recall testifying when you first looked at this picture that you didn't know where Kwok Wei was at the time that picture was taken?

A. No. I try to point it out to Mr. Hertogs, that he didn't ask me about Kwok Wei. I wasn't hesitating about Kwok Wei's picture in here. You remember that we missed Kwok Wei on the record and then Mr. Hertogs go again, and I change it

(Testimony of Wong Kwok Foo.)

then that way, Kwok Wei is here. You didn't ask me. That was the way I spoke to Mr. Hertogs. I didn't say Kwok Wei wasn't here. I pointed out he didn't ask me about Kwok Wei.

Q. How old was Kwok Wei at the time that Exhibit 3-E was taken?

A. He must be about—it would be now in 1949. You might say he is 14, wouldn't it? [52]

The Court: Did you say that was 3-E?

Mr. Dooley: Yes, your Honor.

Mr. Hertogs: That is 3-C, I believe.

The Court: And I have 3-D. What does it say on the back of it?

Mr. Hertogs: 3-E, that is correct.

Q. (By Mr. Dooley): No. 7, I believe you testified that was Wong Jin, did you not? A. Yes.

Q. Now, Wong Kwok Jin was how old at the time 3-E was taken?

A. Either 11 or 12 in Chinese age.

Q. Wong Kwok Jin was younger than Wong Kwok Wei? A. Yes, by age, yes.

Q. Was he taller than Wong Kwok Wei when this picture was taken?

A. Yes. He was bigger than Kwok Wei but, of course, now I don't know whether he is bigger or not by appearance. We have to match that again, but I am sure at the time he was bigger, and for some reason, I don't know, during the wartime, undernourishment, or also he had malaria, and all those sicknesses, because his development is later and he looked so small. I feel the same way about

(Testimony of Wong Kwok Foo.)

my brother. Kwok Jin is still, compared to the American build, still small for 11 or 12, and Kwok Wei, by looking at him, is just a small kid. [53]

Q. But you remember at the time the photograph was taken Kwok Jin was bigger than Kwok Wei?
A. Yes, positively, I do.

Q. How much taller was Kwok Jin than Kwok Wei at the time the picture was taken?

A. Oh, at least a very outstanding quarter of a head or half a head.

Q. When you went back to China in 1947, you had no way of recognizing Kwok Wei, did you, from the little boy that you had seen when you left there in 1939?

A. You mean do I recognize Kwok Wei at the first? You mean our first reunion again, you mean?

Q. Yes.

A. Oh, yes, I recognize him, yes. Well, although he might have changed a little bit, but still in my memory I recognize him.

Q. In what way did you recognize him?

A. Now, you mean—how do you mean? Do I have to introduce like saying, “this is your No. 5 brother”? Or you mean is that the—is that the way you mean it, or do you mean do I carry that in my memory all the time?

Q. Was there any particular feature by which you recognized Kwok Wei?

A. Just a general outline of his face. I don't think he changed too much as far as the face is concerned, but he is [54] bigger than when he was, you

(Testimony of Wong Kwok Foo.)

know, taller. When I left there, he is four or five years of age, and he is just a little tiny tot, and he grow into boyhood, and I recognized him, naturally, anyway.

Q. I show you Plaintiffs' Exhibit 3-C. You stated that must have been taken in 1934.

A. Yes, correct, yes.

Q. How old were you at that time?

A. 12.

Q. How old was Kwok Keung at that time?

A. If he was 12, he would be 13. Those are just back in my memory, the Chinese age. I didn't calculate on 12 month annual age.

Q. For what reason were you in Canton City at the time Exhibit 3-C was taken?

A. This one was really a vacation. It was during summer vacation and our father just returned from the United States, so naturally we like to have our vacation together. I mean that is the first vacation we really enjoyed it. No other specific reason for that trip.

Q. Was there a market near Canton City, I mean near Chung Hing Village?

A. No. Speaking in China, it is considered a long distance from our home, but in the way of American measurement, that would be, oh, I would say about 100 miles away from [55] our home.

The Court: A market?

The Witness: No. We were referring to Canton City. Aren't we, Mr. Dooley?

(Testimony of Wong Kwok Foo.)

The Court: He changed his question. He asked you if there was a market near your village.

The Witness: A marketplace, oh, yes. That is Chew Ging marketplace near our home. I would say it is two kilometers, oh, not two miles, but it could be interpreted that way, too. I don't know.

Q. (By Mr. Dooley): The name was Chung Wing?

A. No, Chew Ging—I think that is spelled C-h-e-w G-i-n-g. In other words, that is the public marketplace and consists of 100 some stores in different type of business where we do our buying of foods and any other household necessities.

Q. You say that was about two kilometers?

A. Yes. I think they use kilometer measures in China, isn't it, Mrs. Chan?

The Interpreter: Yes.

Q. (By Mr. Dooley): Just a moment. Don't you know what measurement they used in your village?

A. Oh, yes. In Chinese they call it Chinese mileage.

The Interpreter: It is lis.

The Court: Let's not have any conversation between [56] the interpreter and the witness.

The Witness: I was asking her help to get the equivalent. You want my own interpretation. It is miles. I don't think it is two miles, but it is two miles in Chinese mileage, I put it that way, it is Chinese mileage.

(Testimony of Wong Kwok Foo.)

Q. (By Mr. Dooley): While you were in China, what did you call Chinese miles?

A. In Chinese sound?

Q. Yes.

A. (The witness spoke in Chinese.)

Two miles. It is pertaining to Chinese measuring unit. It is miles in Chinese mileage.

Q. Will you pronounce that again, Mr. Wong?

A. (Witness again speaking in Chinese.) I think you would spell that L-e-u-n-g W-a-l-a. I don't know how to spell it.

Q. (Mr. Dooley speaking Chinese.)

A. Yes, that meaning in two miles in Chinese standard.

Q. Have you ever heard a Chinese mile referred to as a li? A. Yes, that's right.

Q. Did you refer to a Chinese mile as a li while you were in the village? A. Yes.

Q. Is that what you were pronouncing a few moments ago [57] when you were giving the Chinese for Chinese miles, or was that a different word?

A. Oh, the same word, but I use leung wala—I don't get the exact question.

Q. You just said a few moments ago when you were in China you called a mile something like leung wala. A. Leung is two.

Q. You also said a li was the word for Chinese mile.

A. The sound is never—you see, you only use the translation. You are not using the equivalent in

(Testimony of Wong Kwok Foo.)

—well, you mean I pronounce it as lee, l-e-e sound, is that what you mean?

Q. No. When I was asking you whether li was the same word you had pronounced previously——

A. Yes, it is the same word. A mile is the equivalent in Chinese sound, and it is l-a-y.

Q. How far is your village Chung Hing Village from Canton City?

A. There is no direct highway from our home to Canton. From my last trip to China, I happen to know the air mileage. That was 20 minutes by air. That is air mileage. But when we travel from our home to Canton, we travel by water carrier, which is equivalent to your river steamboat, or one of those ancient river transportation implements.

Q. Do you know the distance from your village to Canton [58] Village?

A. By the exact mileage, no, I don't.

Q. Do you know the approximate mileage?

A. I would say, oh, 80 to 100 miles in American mileage or equivalent. From about 80 to 100, I say it that way.

Q. The last time you were in your village, how many houses were there in your village?

A. You want the exact number or the approximate size of the village?

Q. Do you know the exact number?

A. It is anywhere around 30 to 32, I would say, anywhere from 30 to 32. It wouldn't be too great many number less or too great many number more.

(Testimony of Wong Kwok Foo.)

I would say 30 to 32. I am considering all—I mean 32 houses or buildings, I say it that way.

Q. Were the houses divided into rows the last time you were there?

A. Yes, that is the way it was. Yes, that is the way the village is set up in China.

Q. How many rows?

A. I believe it is nine rows. I think it is nine.

The Court: How old were you when you left the village?

The Witness: You mean the last time I left there in 1949? [59]

The Court: How old were you when you left the village the first time?

The Witness: The first time was 16 Chinese age, the first time when I left the village.

The Court: You remember the village as it was when you left it, don't you?

The Witness: No, I didn't put it in my mind too much about it. I stayed here from 1939 to 1947, during all those years, and I did work a great deal of the time.

The Court: You lived in the village for 16 years.

The Witness: You say 14 full years, you might say, because a few months before I go away.

The Court: You know how many houses were in the village, don't you?

The Witness: I gave him the number as 30 to 32.

The Court: You know how many rows there were in the village.

The Witness: Yes, I gave him nine rows.

(Testimony of Wong Kwok Foo.)

The Court: What row did you live in?

The Witness: If you count in—well, actually, the first from the head of the village, there is only one house in the first row, and there is a couple of public places, and a second, third, fourth—I would say the fourth row at the head of the village, counting from the head of the village. [60]

The Court: Fourth row from the head?

The Witness: Yes, because the first row only one house. I don't know whether you would call that a row or don't count that. If you count it a full row, you would say my house would be third, and other would be fourth row.

The Court: Where was your house in the fourth row? How many houses were there in the fourth row?

The Witness: I believe only five, yes. Our house is the last one in the row, so there was five. Yes, five.

The Court: Your house was the last one?

The Witness: Yes, that would be the fifth one, the last one, the last house.

Q. (By Mr. Dooley): You stated you had spent 14 years in the village instead of 16. How old were you when you went to Hong Kong to come to the United States for the first time?

A. Then it would be—well, let's see. I just turned 16 in 1939. Oh, well, then I would be still about approximately in the full year calculation still not less than 15, still 16 in Chinese age, still 16 in Chinese age there at the time when I depart.

(Testimony of Wong Kwok Foo.)

Q. When you left the village?

A. Yes, the first time, yes, I mean for my trip here.

Q. The first time, how long did you stay in Hong Kong?

A. Let's see. I got there, oh, let's see, within four months time. I don't recall the exact days and months. About [61] less than four months, about four months time.

Q. (By Mr. Dooley): Within four months time you came to the United States?

A. Right, yes.

Q. When you went back in 1947, did you spend all of your time in the village?

A. Yes, most of the time, yes. As far as my residency is concerned, yes, you would say all the time, but, in other words, I am not in the village every day or every hour of the day, I am not there.

Q. When did you marry?

A. You want the CR date or American calendar? It happened to be the last—of course, that is just a recent event so I could give you both. It happened to be the last month and the 15th day in the year of—CR date would be 37. It would be CR date 37-12-15. The equivalent is 1948, January 15, somewhere around that neighborhood.

Q. Did you marry in the Chung Hing Village?

A. Yes. The marriage took place in Chung Hing Village, yes.

Q. Did any of your brothers attend your wedding?

(Testimony of Wong Kwok Foo.)

A. Oh, yes. Yes, with the exception of the older brother and Kwok Keung was schooling then, so, in other words, Kwok Hoy, Kwok Wei, Kwok Jin, yes.

Q. Kwok Hoy, Kwok Wei and Kwok Jin attended your wedding? [62] A. Yes.

Q. Were you married in your home in the village? A. Yes.

Q. Did you have any ancestral worship as a part of the ceremony?

A. No. In my case we simplify that. No, I didn't follow exactly.

Q. Just what sort of ceremony did you have?

A. You want me to describe what sort of—well, we did after the—let's see, our marriage day, we give a party of, oh, just say within 10 tables, you know, 10 persons at a table, you would say 100 guests, maybe. Those just come from the village. Is that what you wanted, Mr. Dooley, or do you want the Chinese tradition, you bow to your parents and all that? I cut all that out myself. I didn't do that. I didn't wear Chinese gown. I just wear my sport jacket and slacks instead of Chinese gown.

Q. Did your wife wear Chinese clothes?

A. Yes, she wear Chinese clothes, yes, she did, but I didn't.

Q. How was your wife brought to the wedding?

A. By—what you call it? A sedan? It is like with a bamboo stick and carried by the human shoulders. Is that what you call a sudan or sedan? What do you call that? A [63] human carriage.

(Testimony of Wong Kwok Foo.)

Q. Are you referring to a sedan chair?

A. Yes, I refer to sedan chair, yes.

Q. What time of the day did the wedding take place?

A. In afternoon hours.

Q. When you came to the United States in 1939, do you know the reason that Wong Kwok Keung didn't come to the United States at that time?

A. Yes, I do.

Q. What was the reason?

A. Well, since my second brother is here in the United States already, and then the older brother is here, and then I am about to come over here, naturally, one of us had education in our home, see, so I think either my father or my mother's idea, thinking it is good to have one of the boys have a full education in our homeland. That was the intention, anyway.

Q. Did your father have any brothers?

The Court: Mr. Dooley, it's 12:00 o'clock and after. I don't suppose you are going to be able to finish this cross examination before lunch time, are you?

Mr. Dooley: I don't believe so, your Honor.

The Court: You are starting on a new tangent.

Mr. Dooley: Yes. I wanted to develop a few more facts. There is another matter, your Honor. The deposition [64] is sealed in such a way that I can't get the radiographs out, and Mr. Hertogs said it would be agreeable to break the seal so the radiographs can be taken out and examined.

(Testimony of Wong Kwok Foo.)

The Court: That is perfectly all right with me. You agree to it, do you?

Mr. Hertogs: I agree to it. Of course, I am not agreeing to their admissibility, but I am not objecting to this.

The Court: It may be opened.

We will now stand in recess until 2:00 o'clock this afternoon.

(A recess was taken to 2:00 o'clock, p.m.)

Tuesday, January 22, 1957, 2:00 p.m.

The Court: You may proceed.

WONG KWOK FOO

the witness on the stand at the time of the recess, having been previously duly sworn, was examined and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Dooley): Mr. Wong, I believe you testified that Exhibit 3-C was taken in Canton, is that true? A. Yes.

Q. And you testified this was taken about 1934, I believe you testified? A. Yes.

Q. When your father was back in China?

A. Yes.

Q. And on Exhibit 3-E, you testified that this on the end is a picture of Wong Kwok Wei.

A. Yes.

Q. Do you recall testifying before the Immigra-

(Testimony of Wong Kwok Foo.)

tion and Naturalization Service when you came to the United States in 1939?

A. Somewhat, yes. [66]

Q. I am going to call your attention to a question which was asked of you. First I am going to show you Plaintiffs' Exhibit 2 for identification, and call your attention to page 7 of this form and ask you if this is your signature on page 7.

A. The Chinese characters?

Q. Yes.

A. Yes, those are my own, yes.

Q. I am going to call your attention to a question which was asked you as part of this hearing and ask you whether the question was asked and whether this was the answer you gave:

“Q. Did your father have any group photograph taken of any members of his family while he was in China? “A. No.”

Was that question asked you and was that the answer you gave?

A. Of course, the question was answered through an interpreter and I didn't have any chance like I have today to ask further, and I don't know whether I stated it that way or maybe it come from myself or the interpreter. I don't know. I don't blame it on the interpreter, or whether that was myself. I just overlooked the question or misunderstand it myself, but I mean, of course, today I recall the picture when you point it out. [67]

Does the record show the picture was shown to me at the time?

(Testimony of Wong Kwok Foo.)

Q. No, the record doesn't show that, but this is the question:

“Did your father have any group photograph taken of any members of his family while he was in China?”

A. In my own thinking, maybe at the time when they say group picture, in our Chinese language that would include all the members of the family, which doesn't include my older brother and second brother, so maybe that is why I thought that was the proper answer to say, although just two of the four boys is shown with the parents. Maybe that was my answer to the number at the time.

Q. I call your attention to another question which was asked at this hearing and ask you whether this question was asked you and whether this was the answer you gave.

“Q. Were there ever any photographs taken of your two younger brothers, Kwok Wei or Kwok Keung?”

“A. No.”

Was that question asked you and was that the answer you gave?

A. Yes, that is true. I mean at that time Kwok Wei wasn't there, so how—I mean, in other words, [68] when we take this picture, Kwok Wei wasn't there. He wasn't born then, in 1934.

The Court: Mr. Dooley, what is the date of that examination?

Mr. Dooley: 1939.

The Court: 1939?

Mr. Dooley: Yes, your Honor.

(Testimony of Wong Kwok Foo.)

The Court: And what is the question? What was the question?

Mr. Dooley: Let's see. I believe I had the dates wrong myself, your Honor, in that question on the second picture.

The Court: What was the question?

Mr. Dooley: The question was:

"Were there ever any photographs taken of your two younger brothers, Kwok Wei or Kwok Jin?"

"A. No."

I don't have a discrepancy on the second question, because I have the dates confused there myself.

The Court: All right.

Q. (By Mr. Dooley): When was Exhibit 3-E taken? A. Just in the spring of 1949.

Q. Now, Mr. Wong, would you describe the house in which you lived while you were in the village?

A. Yes. It is—well, I mean the majority of [69] Chinese houses are built rectangular.

The Court: The house you lived in, not the majority.

The Witness: I see. You mean the material or the interior, how they were partitioned, or what do you mean?

Q. (By Mr. Dooley): I will ask another question. How many rooms did the house have?

A. Actually, originally it is only two bedrooms, regular two-bedroom house.

Q. It had two bedrooms? A. Yes.

(Testimony of Wong Kwok Foo.)

Q. Did it have any other rooms besides?

A. Subsequently we did add a wooden partition in the center parlor to accommodate more—you know, the increased members in the family, and then I mean generally you would say four instead of the original two, but there was originally only two, and up to the last time I was in China, naturally, we have four partitions with wooden material in the center parlor for two smaller rooms. You see, our center parlor is larger than the—I mean here in American-built homes.

Q. You mean two bedrooms and a center parlor. Was that a part of the bedroom or a separate room?

A. No, it wouldn't be—well, you see, just partitioned. If there is a center parlor here, you can always partition a smaller room here and a smaller room here. [70]

The Court: Give him a piece of paper, Mr. Dooley, and let him draw the contour of the house, that is, as you remember it when you grew up in China, that is before you came here, up to when you were 16 years of age.

The Witness: Prior to my arriving in the States?

The Court: Yes.

The Witness: Oh, yes. The house generally is in this—I don't know whether I get the exact way it is here. You see, there was only two, that is the way the houses are built in China, and that is the bedroom, that is the bedroom, and that is the cen-

(Testimony of Wong Kwok Foo.)

ter room, you call it a parlor, and the kitchens are here. That is the two kitchens.

The Court: Will you mark those bedrooms and kitchens?

The Witness: Yes, okay. I will just mark down here bedroom and this also bedroom, and then I just put down kitchen.

The Court: And mark the center parlor.

The Witness: I will just put parlor there.

The Court: That is the house that you remember you grew up in, is that right?

The Witness: Yes, that is the house before my age 16.

The Court: All right.

Q. (By Mr. Dooley): Where was the entrance door? [71]

A. Oh, yes. It has an entrance, and it has another entrance, because here is an entrance generally to the parlor. I put it this way, see? Okay.

Q. That was in 1939 when you left China?

A. Yes, that's right. And then I can describe the later part to you in 1949. The last time when I remember my home, there was a partition.

Q. That is 1939 there? A. Yes.

Mr. Dooley: Let's mark that for identification.

The Court: It may be marked for identification.

The Witness: Those are just later on after our family, you know, my marriage and all, prepared for my marriage.

The Court: That is Exhibit A, and I suppose

(Testimony of Wong Kwok Foo.)

there is no reason it can't be admitted in evidence, Mr. Dooley?

Mr. Dooley: The defendant offers in evidence Exhibit A.

The Court: It may be received in evidence.

The Clerk: Exhibit A.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit A.)

Q. (By Mr. Dooley): Now, in 1947, when you went back to China, will you describe or will you draw a diagram of the house at that time?

A. Okay. This is 1947. As I say, the house——

The Court: Let's have that marked, Mr. Dooley. We can mark that as Exhibit B in evidence.

The Clerk: Exhibit B.

(The exhibit referred to was received in evidence and marked as Defendant's Exhibit B.)

Q. (By Mr. Dooley): Mr. Wong, what was the floor of your house made of?

A. The floor? Well, the center parlor is cement floor, and the bedroom, or the kitchens are just plain dirt floor. Whether there is any equivalent here or not, I mean it is packed dirt floor.

Q. The bedroom is dirt? A. Yes.

Q. Is that in 1939? A. Yes.

Q. And the center parlor was cement?

A. Yes.

Q. And the kitchens were dirt? A. Yes.

Q. Were the floors the same in 1947 when you went back as they were in 1939?

A. Haven't been changed, the same.

(Testimony of Wong Kwok Foo.)

Q. Did the bedrooms have any windows?

A. Yes.

Q. How many windows? [73]

A. Let's see. One on the side. Of course, what they call a skylight, and there is a little one on the top. You don't call that a window, so it is actually only one window.

Q. One window in the bedroom. That was in 1939? A. Yes.

Q. There was a skylight in the bedroom?

A. Yes. That would be on the roof. It was directly on the roof.

Q. How many skylights in the bedroom in 1939?

The Court: In each bedroom?

Q. (By Mr. Dooley): In each bedroom.

A. I believe there is one just right above the doorway there. I think there must be another one in the back part, so I think there is two skylights.

Q. Do you remember two, or are you guessing?

A. The second one, I am not too—you see, because our bedroom in China often so much longer, and when you don't have electricity system over there, you know, the room is, even with one window is not real bright, you know, not like here. When you walk into a room, your windows and things are so noticeable, so the second one I wouldn't say positive. When you ask me I say possibly two, but I know there was one right above your doorway when you open the door, and there is one on the top there, and I think this one should be like I am pointing now. If I enter my bedroom,

(Testimony of Wong Kwok Foo.)

[74] that would be one above your door, and then would be one somewhere about where you are standing, or even further back.

That is how big the bedrooms in old houses are, you know, much longer than the bedrooms are here.

Q. What was the color of the house?

The Court: You mean the outside color?

Mr. Dooley: Yes, your Honor, the outside color.

The Witness: The construction is brick, and what color would brick be, because it isn't red like the brick we see over here.

Q. (By Mr. Dooley): Then what color was it?

A. I mean I think it is called—there is no—I don't think—I don't know whether it is gray or not. I mean all the Chinese bricks are standard as far as in China is concerned, so could that be the answer you want?

Q. You saw the color, so what is the color? You have seen the color since you have been to the United States, haven't you?

A. Well, yes, I would say similar to my—the bricks are similar to my coat here, so I am—not the exact shade, but I mean in that order, anyway. It would be in the order of gray, I think, you know, not either white or yellow or other colors. Do you get the idea of what this is?

Mr. Dooley: Let the record show the witness is wearing a gray suit. [75]

The Court: It is a kind of a greenish-gray, isn't it?

The Witness: But I wouldn't say exactly. Of

(Testimony of Wong Kwok Foo.)

course, brick is standard over there. The house bricks are pretty generally, even on the outside they are not the same as on the inside. Maybe on the outside they bake more and that color is more or less well baked, and the inside is a different color, but that is a general rule.

I know about the brick, but it isn't necessarily my house built out of the material. I didn't tear out my house wall to see what color it is, but that is my general description of the material.

Q. (By Mr. Dooley): You mean from the outside as you looked at it?

A. Yes, it would be this shade. It isn't white or colored, because those are the outstanding colors here, and it isn't positively white or yellow or green. That is not the color. So it is along this shade as my sport jacket.

Q. It was gray?

A. Yes, I classify it as a gray tentatively, yes.

Q. Did you have any balconies in your house?

A. Yes, there is a balcony, yes.

Q. Where were the balconies located?

A. The balcony would be located in each bedroom. That generally runs like the shape of a 7 in your bedroom, and I [76] think used for storage purpose, because over there, just one story house, it is almost as high as your buildings here, not quite, I wouldn't say approximately not quite, so there is always room for a balcony like the shape of an L. In conversation, the whole bedroom would be L-shaped.

(Testimony of Wong Kwok Foo.)

Q. They had one in your house? A. Yes.

The Court: In both bedrooms?

The Witness: Yes.

Q. (By Mr. Dooley): Did you have any shrines in your house?

The Court: Any what?

Mr. Dooley: Shrines.

The Witness: You mean for making a prayer or occasional ceremonial purpose, is that what you mean?

Q. (By Mr. Dooley): Yes.

A. Yes, there is one. I think so, yes. You call that a shrine, or is it an altar? Wouldn't it be something like that?

Q. What did you have of that nature in your house?

A. We have right smack in the center, there is a little balcony—you see, another little balcony there with, yes, for praying purposes, or any ceremonial purpose.

Q. And it was a balcony?

A. Yes. Also, there is a little balcony there. [77]

The Court: What room was that?

The Witness: In the parlor, the back part of the parlor.

Q. (By Mr. Dooley): What villages were there close around Chung Hing Village?

A. By which direction are you asking me, Mr. Dooley? Going down like to Chew Ging market-place, or going up the other direction?

(Testimony of Wong Kwok Foo.)

Q. First in the direction of Chew Ging market-place.

A. Yes. You mean to point out the nearest village that might be, you know, on the way where you travel to Chew Ging?

Q. Yes, the nearest village.

A. There is one called Gow Leung, I think they spell it G-o-w L-e-u-n-g, village, a tall—equivalent to either a slope or mountain, in that meaning.

Q. In which direction do you go from your village to get to Chew Ging market?

A. Let's see. Our village is facing west, so naturally the back would be east, wouldn't it? So, in other words, I would say if I go to Chew Ging from Chung Hing Village, it would be eastward. Gow Leung would be on my left-hand side if I travel eastward.

The Court: Let me ask you a question. The head of the village, is that in any particular [78] direction in China? Is that in any particular direction in China? Is it toward the east or north or west? Does the head of the village point to any particular direction?

The Witness: No. Consider as the head of the village, you see, each village should have what they call a common place, in other words, it is not your house, it is not my house, but it belong to everybody, so I think you started from wherever the common place is built. You call that the head of the village.

(Testimony of Wong Kwok Foo.)

The Court: Was that the head of the village in your village?

The Witness: Yes.

The Court: It was a common house?

The Witness: Yes.

The Court: Was that to the west, east, north, or south, or do you know?

The Witness: The village is facing west, and then back is east, so that would be on the south, wouldn't it? The south side—let's see, how could I get it? The direction opposite from west is—you see, because our direction is not like your S and N and E and W, because we go from what they call a circle—you say it clockwise? Let's see. I have to get the exact facing. The facing of my village, that would be—just to make it easy, to say facing west. Of course, the back wouldn't be east, would it? Let's see. [79]

The Court: You don't use north and south in China, do you, or east and west?

The Witness: No, not too often, because we not like a street intersecting, so it isn't necessary to point out, like I say, S for south and N for north.

The Court: Where was Canton from your village? Was that north, south, or east or west, or do you know?

The Witness: Canton would be behind our village. In other words, if my village is facing west—

The Court: Then it would be east?

The Witness: Yes, so I said it right, sir, on

(Testimony of Wong Kwok Foo.)

the east, because the village isn't built exactly, you know, not by compass pointing position, so it isn't exactly west, see, so that is why, when you ask me the head of the village, is it south, I say southwest or southeast.

The Court: What direction would you have to go to Hong Kong?

The Witness: That would be the same. That is still going directly opposite from our village the way it is facing. It would be the same direction as going to Hong Kong, only I say strict to the right would be Hong Kong, strict to the left would be Canton.

Q. (By Mr. Dooley): Straight to the right would be Hong Kong?

A. Yes, if we are going to—like I leave [80] Chung Hing Village going to Hong Kong, I would say going down there, that would be—I mean that direction now. I am not pointing out the distance, because the distance is, like I say, there is no highway system or railroad system directly to Hong Kong, so I say if you travel to Hong Kong, it would be part way to your right and to Canton it would be part way to your left for the two city locations?

Q. Did your father have any brothers?

A. Yes, he has.

Q. How many brothers did your father have?

A. Let me see. Well, actually, I only saw one of my uncles. The other two, I didn't see them. So

(Testimony of Wong Kwok Foo.)

let's say my brother has—my father has three other brothers, so it would be four with my father.

Q. Do you know their names?

A. I only, sir, know the No. 2 brother. He happened to live in Los Angeles for some time before he pass away. That is the only one I ever met. That is Wong Soo, that is his name.

Q. Wong Soo?

A. Yes. I think he used the name Soo, S-o-o.

The Court: He is the only one you ever met?

The Witness: He is the only one I ever met, yes, of my father's brothers. The other two, I never met them.

Q. (By Mr. Dooley): You said Gow Leung Village is to the east of your village? [81]

The Court: Mr. Dooley, the trouble is you are getting into east and west and north and south. You and I understand it, but I don't know whether they understand directions like that in China. I will ask the interpreter. Do they use east and west and north and south in China?

The Interpreter: Not in the village too much. In the cities, they have more like the United States way.

The Court: But out in the country, do they say, "I am going north," or "I am going south"?

The Interpreter. No. Definitely, as the witness has stated, the demarcation lines are very vague, and also the sectional divisions and the compass. In the village, they just have names.

(Testimony of Wong Kwok Foo.)

The Court: Then the villagers wouldn't know what you mean by north and south?

The Interpreter: Not unless he is awfully clever. If he has traveled a lot, but not the ordinary villagers I have encountered.

The Court: All right, Mr. Dooley.

Q. (By Mr. Dooley): Gow Leung Village is in the direction of Chew Ging market? A. Yes.

Q. Were there any villages, say within 10 lis in the opposite direction from Chew Ging market?

A. Gee, you mean in 10 lis? 10 miles? That would be quite a distance.

The Court: Let me ask a question. How much is a li?

The Witness: A li is one Chinese mile. It is one-third of your mile, I believe, equivalent to the English unit. One li is one mile. If you are asking me within 10 lis, that would be over three miles. Oh, yes, there is quite a number of villages. If your eyes see three miles, there is a number of villages within your eye vision, yes.

Q. (By Mr. Dooley): What is the closest one going in the opposite direction from Chew Ging market?

A. The opposite, in other words, if you go the direction our village is facing now, is that what you mean?

Q. Your village faces west?

A. Yes. Is that what you mean now? There is one, Lung Wan.

Q. How far is that from Chung Hing Village?

(Testimony of Wong Kwok Foo.)

A. From Chung Hing Village, I would say about five city blocks, I mean equivalent, whatever that is, to the city block here, so about five city blocks.

Q. How far is Gow Leung Village?

A. That would be exactly midway from our village to Chew Ging. That is one Chinese mile.

Mr. Dooley: No further questions. [83]

The Court: May this witness be excused?

Mr. Dooley: He may as far as the defendant is concerned.

The Court: All right. You may be excused.

Mr. Hertogs: May I ask one question, please?

The Court: Oh, yes.

Redirect Examination

Q. (By Mr. Hertogs): At the time you arrived at Seattle, Washington, in 1939, who was larger, you or your brother Keung?

A. Very close. When I left him, we were both about the same size. He might be a little heavier than I am, but about the same size.

Q. How about height?

A. Oh, let's see. Height, at the time I arrived there, I think I am just a little shy of five feet. I was a little shy of five feet high.

Q. How about Keung, was he taller or shorter than you?

A. You wouldn't notice the tallness over me, but he probably actually, I think he is a little taller than myself, because we, you know, our friends

(Testimony of Wong Kwok Foo.)

often tease about us being twins and all that, so that is how I happen to recall.

Mr. Hertogs: I have no further questions of this witness. [84]

The Court: You may step down. You may be excused.

(Witness excused.)

Mr. Hertogs: Wong Kwok Keung.

WONG KWOK KEUNG

called as a witness herein by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Wong Kwok Keung.

The Clerk: How do you spell your last name?

The Witness: K-e-u-n-g.

Direct Examination

Q. (By Mr. Hertogs): Mr. Wong, it is going to be necessary for Mr. Dooley, who represents the government in this case here, to know what you are saying, so would you speak up rather loudly so I can hear you and he can hear you?

A. I will do my best.

Q. If you have any trouble with the questions, indicate that to the court and he will ask Mrs. Chan, the interpreter, to help you.

A. Yes.

Q. Where do you live? [85] A. Now?

Q. Yes.

(Testimony of Wong Kwok Keung.)

A. 10420 South Main, Los Angeles.

Q. Who lives with you at that address?

A. My brother, Kwok Wei Wong.

Q. Is 10420 South Main a store?

A. Behind a store. We got the house behind the store.

Q. What kind of store is located at that address?
A. Grocery store.

Q. Who owns and operates that grocery store?

A. My brother, Wong Kwok Foo.

Q. Where is he? A. At the store.

Q. Where is your brother Wong Kwok Wei?

A. In the room.

Q. He is or was in the court room earlier?

A. Yes.

Q. Did you see the last witness who was just leaving the court room?
A. I seen him.

Q. Who was that?

A. My brother Kwok Foo.

Q. Where were you born? A. In China.

Q. In what district in China? [86]

A. Kwang Tung Province, Toy Shan District, and Chung Hing Village.

Q. What is the date of your birth? Can you give it to us in American?

A. I only remember the Chinese calendar.

Q. What is it?

A. 11th year, September 3.

Q. That is the ninth month in the Chinese and the third day?
A. That's right.

(Testimony of Wong Kwok Keung.)

Mr. Hertogs: May we have that converted into American?

The Interpreter: October 22, 1922.

Q. (By Mr. Hertogs): What is the name of your father? A. Wong Ho.

Q. Des he have another name? A. Yes.

Q. What is that name? A. Wong Hing.

Q. Is that the last part of the name? Does he have a family name?

A. No, I don't think so. Wong Hing, or Wo Hing Wong. Wong is the last name.

Q. Where is your father living at the present time? A. In my brother's house. [87]

Q. In which brother's house?

A. 3424 Edgehill Drive, Los Angeles.

Q. What brother lives there at that address?

A. Wong Kwok Foo.

Q. What is the name of your mother?

A. Yee Fong Yee.

Q. Where is she living at the present time?

A. In Hong Kong now.

Q. Has she ever been to the United States?

A. No.

Q. How many brothers and sisters do you have?

A. Including me, six brothers and no sisters.

The Court: Including yourself?

The Witness: Yes, I have five brothers.

Q. (By Mr. Hertogs): What is the name of your first brother? A. Wong Loon Kwong.

Q. Where was he born? A. In China.

Q. Do you know the name of the village?

(Testimony of Wong Kwok Keung.)

A. Well, will you give me time?

Q. Yes.

A. Wong Ock Village, Hoy Shan.

Q. How old is he today?

A. Let me see. I think 44. [88]

Q. Where does he live?

A. In Seattle, Washington now.

Q. Do you know when he came to the United States?

A. Well, let me think of it. According to the Chinese calendar, he came here about 26 years, 26.

Mr. Hertogs: May we have that in the American year, Mrs. Chan?

The Interpreter: CR 26?

The Witness: Yes, CR 26.

The Interpreter: 1937.

Q. (By Mr. Hertogs): What is the name of your second brother? A. Wong Kwok Hoy.

Q. Is he the one that operates the store at 10420 South Main? A. That's right.

The Court: How old is he?

The Witness: 43.

Q. (By Mr. Hertogs): Do you know the year he was born?

A. Well, can I figure with the pencil? CR 2. No, excuse me. 3.

Q. Where was he born?

The Court: Wait a minute. CR 3 is what year?

The Interpreter: That would be 1914 or the early part of 1915. [89]

Q. (By Mr. Hertogs): Where was he born?

(Testimony of Wong Kwok Keung.)

A. In China, sir.

Q. In what village?

A. Chung Hing Village.

Q. Is that the same village you were born in?

A. Yes.

Q. When did he come to the United States?

A. You mean when?

Q. Yes, when. A. CR 22, I believe.

Mr. Hertogs: May we have that in American?

The Interpreter: 1933 to the early part of 1934.

The Court: He came to the United States before your No. 1 brother?

The Witness: Yes, before my old brother.

Q. (By Mr. Hertogs): Who is the No. 3 son?

A. No. 3?

Q. Yes. A. Me.

Q. You are No. 3? A. I am No. 3.

Q. Who is No. 4?

A. Kwok Foo, who just left.

Q. What is the date of birth of Kwok Foo, if you know?

A. You mean the birthday? [90]

Q. Birthday.

A. I don't know exactly, but I think approximately, Chinese calendar, September 9, I think.

Q. What year?

A. You mean what year he was born? 12, CR 12.

Mr. Hertogs: May we have that in American, Mrs. Chan?

The Interpreter: 1923 to early 1924.

(Testimony of Wong Kwok Keung.)

The Court: You didn't tell how old you are.
How old are you?

The Witness: 35 this year.

The Court: When were you born?

The Witness: CR-11-9-30. You mean when or
where, sir?

The Court: No, just when.

The Witness: CR-11-9-30.

Mr. Hertogs: I think that was in the record already, your Honor.

The Court: Let's get it translated.

Mr. Hertogs: She translated it earlier.

The Interpreter: 22nd of October 1922.

The Court: How old is your No. 4 brother?

The Witness: You mean Kwok Wei?

The Court: Yes.

The Witness: Kwok Wei is 27—22, I mean. [91]

The Court: 22?

The Witness: Yes.

Mr. Dooley: Is that No. 4?

The Court: No. 4?

The Witness: Yes, No. 4.

Q. (By Mr. Hertogs): That is Kwok Wei?

A. Excuse me. Kwok Foo is No. 4. I'm sorry.

The Court: Is he 22?

The Witness: No, he is less than me one year.
He is 34.

The Court: 34?

The Witness: 34.

Q. (By Mr. Hertogs): What is the name of
your No. 5? A. Kwok Wei.

(Testimony of Wong Kwok Keung.)

Q. What year was he born?

A. He was born in China.

Q. What year? A. You mean Kwok Wei?

Q. His birth, yes. A. CR 26.

Mr. Hertogs: May we have that, Mrs. Chan?

The Witness: Excuse me. I am mixed up. Let me count it. 24.

The Interpreter: CR 24 is 1935 to early 1936.

The Court: How old is your No. 5 brother? [92]

The Witness: You mean Kwok Wei?

The Court: Yes.

The Witness: 22.

Q. (By Mr. Hertogs): Do you know the month and day that he was born in that year?

A. You mean Kwok Wei?

Q. Kwok Wei. A. March 28.

Q. You are talking about the third month and 28th day in Chinese? A. No.

Q. You are talking about Chinese calendar?

A. Yes. That is Chinese calendar.

Mr. Hertogs: May we have that translated to American? That was CR 24-3-28.

The Interpreter: April 30, 1935.

Q. (By Mr. Hertogs): In what village was he born? A. Chung Hing Village.

Q. What is the name of the sixth brother?

A. Kwok Jin.

The Court: How old is he?

The Witness: He is 20.

Q. (By Mr. Hertogs): Where was he born?

A. In China.

(Testimony of Wong Kwok Keung.)

Q. What village in China? [93]

A. Chung Hing Village.

Q. Do you know in what year he was born?

A. Kwok Wei is——

Q. Kwok Jin. A. 26.

Q. Do you know the month and day in the 26th year?

A. Let me think. I try to recall. I think it was—you mean the month?

Q. The month? A. CR January.

Q. First month? A. Yes, Chinese.

Q. Do you know the day in the first month?
Can you think of the day?

A. I am not very sure. I think it is 10.

Mr. Hertogs: May we have a translation of that?

The Interpreter: 1-10 of the 26th year?

Mr. Hertogs: Yes.

The Interpreter: February 20, 1937.

Q. (By Mr. Hertogs): When did you come to the United States? A. Pardon me, sir?

Q. When did you come to the United States?

A. 1952.

The Court: How old were you when you came to the United States? [94]

The Witness: 31, sir.

The Court: You were 31 when you came to the United States?

The Witness: Yes, when I came to the United States.

Q. (By Mr. Hertogs): I show you Plaintiffs'

(Testimony of Wong Kwok Keung.)

Exhibit No. 1 and ask you if you recognize the photograph of the persons thereon.

A. That is Kwok Foo.

Q. Who is Kwok Foo?

A. My brother, fourth brother.

Q. Is the person that was in this court room earlier?

A. He just left.

Q. I show you Plaintiffs' Exhibit No. 3-A for identification and ask you if you recognize the photograph of the person contained on the back side thereof.

A. Kwok Wei.

Q. Who is Kwok Wei?

A. My fifth brother.

Q. Is he the boy who is in the back room?

A. Yes, in the back room.

Q. Did he come to the United States with you?

A. Yes.

Q. I show you Plaintiffs' Exhibit No. 3-B for [95] identification and ask you if you recognize the picture of the person on the back side thereof.

A. That is my picture.

Q. Is that your signature up at the top of the reverse side?

A. That's right. You mean the signature?

Q. Yes. A. That is my signature.

Q. Do you recall making this application at the American Consulate in Hong Kong?

A. I signed this, and this is my signature. This is what I remember. That wasn't typed by me.

Q. This is your signature? A. Yes.

(Testimony of Wong Kwok Keung.)

Mr. Hertogs: I will ask that Exhibit 3-B be admitted in evidence.

The Court: It may be admitted in evidence.

The Clerk: It has already been admitted.

Q. (By Mr. Hertogs): I will show you Plaintiffs' Exhibit No. 4 for identification and ask you if you recognize the photograph of the person thereon. A. This is my father's picture.

Q. What is his name? A. Wong Ho.

Q. Is he the person that is in the back room here today? [96]

A. Yes, with my brother.

Q. I will show you Plaintiffs' Exhibit No. 5 for identification and ask you if you recognize the picture of the person thereon.

A. That is my picture.

Q. Turning to the inside page, I will ask you if you recognize the signature at the bottom thereof.

A. Yes, that is my signature.

Q. Is this the document that was issued to you by the American Consulate General in Hong Kong?

A. That's right.

Mr. Hertogs: I will ask that Plaintiffs' Exhibit No. 5 for identification be admitted in evidence.

The Court: It may be admitted in evidence.

Mr. Dooley: Except for the purpose of the picture——

The Court: Mr. Dooley, if the government issues a certificate of identification, don't you think he has a right to have it introduced?

Mr. Dooley: Yes, for the purpose of showing a

(Testimony of Wong Kwok Keung.)

certificate was given him but not for any of the statements that might be contained thereon.

The Court: If you are making an objection, it is overruled. It may be introduced in evidence.

The Clerk: Exhibit 5. [97]

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 5.)

Q. (By Mr. Hertogs): I show you Plaintiffs' Exhibit 6 for identification and ask you if you recognize the picture of the person thereon.

A. My brother.

Q. What is his name? A. Kwok Wei.

Q. Is that the same boy that is in the back room? A. Yes, sir.

Q. I show you Plaintiffs' Exhibit No. 7 for identification and ask you if you recognize the picture on the second page thereof.

A. This is my picture, sir.

Q. Is that your picture? A. Yes.

Q. Is that your name on the front side thereof?

A. Yes.

Q. Was this issued to you by the Crown Colony of Hong Kong? A. That's right, sir.

Mr. Hertogs: I will ask that it be admitted in evidence.

The Court: It may be admitted in evidence.

Mr. Dooley: I object to anything except the [98] photograph which appears on the document as being hearsay and not authenticated, lacking foundation.

The Court: Objection overruled. Is that 7?

(Testimony of Wong Kwok Keung.)

The Clerk: Exhibit 7.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 7.)

Q. (By Mr. Hertogs): I show you Plaintiffs' Exhibit No. 8 for identification and ask you if you recognize the picture thereon.

A. My brother, Kwok Wei.

Q. I show you a group of photographs which have been admitted in evidence. I show you Plaintiffs' Exhibit 3-C. I will ask you if you have ever seen that before.

A. Yes.

Q. Did you submit that photograph to the American Consulate General at Hong Kong?

A. I sent it to the Consulate at Hong Kong.

Q. Can you tell us who these people are from left to right? Who is the one in the white shirt?

A. Kwok Foo.

Q. Who is Kwok Foo?

A. My brother, fourth brother.

Q. Is that the person that was previously here in the court room?

A. Right. [99]

Q. The person in the back here in the middle?

A. My father, Wong Ho.

Q. Is he the person that is in the back room?

A. That's right.

Q. The person in front of your father?

A. My mother.

Q. Your mother? A. Yes.

Q. And what is her name?

A. Yee Fong Yee.

(Testimony of Wong Kwok Keung.)

Q. And the person at the right-hand side in the white shirt? A. That is me.

Q. That is you? A. Yes.

The Court: Where was that photograph taken?

The Witness: When?

The Court: Where?

The Witness: In Canton.

Q. (By Mr. Hertogs): Do you know when it was taken? A. In Canton.

Q. About what year?

A. Oh, let's see. About, according to Chinese calendar, about around 23.

Mr. Hertogs: Mrs. Chan, can you convert that to American, please? [100]

The Interpreter: 1934.

Q. (By Mr. Hertogs): I will show you Plaintiffs' Exhibit No. 3-E. Have you seen that photograph before? A. Yes.

Q. We will have to take this slow and easy. I have made little numbers on here. I am going to start with No. 1. Who is that?

A. That is my picture.

Q. That is you? A. Yes.

Q. Who is the person right under No. 2?

A. Kwok Foo.

Q. Who is Kwok Foo?

A. My fourth brother.

Q. The person under No. 3?

A. Kwok Hoy.

Q. Who is Kwok Hoy?

A. My second brother.

(Testimony of Wong Kwok Keung.)

Q. Is he the one that operates the store where you live? A. That's right.

Q. This person right under No. 4?

A. My sister-in-law.

Q. What is her name? [101]

A. Ma Sin Kum.

Q. Where does she reside?

A. 3424 Edgehill Drive. She is Kwok Foo's wife.

Q. This little child on her left, No. 5?

A. My nephew.

Q. Whose child is that? A. Soo Jung.

Q. Who is his father? A. Kwok Foo.

Q. This person at the right, No. 6 here?

A. That is my wife.

Q. What is the name of your wife?

A. Yee Ling Hun.

Q. Where is she at the present time?

A. In Hong Kong now.

Q. This person by No. 7 here?

A. My youngest brother, Kwok Jin.

Q. The next one over here, No. 8?

A. My mother.

Q. That is your mother? A. My mother.

Q. What is her name once again?

A. Yee Fong Yee.

Q. She is holding a child I have marked No. 9.

A. My son. [102]

Q. That is your son, and what is his name?

A. Sol Bing.

Q. This female person, the one under 10?

(Testimony of Wong Kwok Keung.)

A. That is my sister-in-law.

Q. Who is her husband? A. Kwok Hoy.

Q. What is her name? A. Ma Kin Chui.

Q. Where is she today?

A. At 104th Street, 206 West 104th Street in Los Angeles.

Q. She is holding a little child we have marked No. 11. A. Soo Chow.

Q. Who is he?

A. Her son and my nephew.

Q. There is one over on the right-hand side marked 12. A. That is Kwok Wei.

Q. Where was that picture taken?

A. When?

Q. All right, when.

A. Before Kwok Hoy and Kwok Foo came back to America.

Q. What year was that? A. '38.

Q. Do you know where it was taken? [103]

A. I know in my village.

Q. You talk about Kwok Foo and Kwok Hoy coming back to America. Were they in China recently? A. Yes.

Q. When did they go to China?

A. When? Kwok Foo went to China before Kwok Hoy.

Q. In what year did Kwok Foo come back to China? A. 36, CR 36.

Mr. Hertogs: May we have CR 36 put into the American calendar?

The Interpreter: 1947 or early 1948.

(Testimony of Wong Kwok Keung.)

Q. (By Mr. Hertogs): When did Kwok Hoy come back to China?

A. About two months later than Kwok Foo did.

Q. Did they come back to the United States together?

A. Yes, sir.

Q. During that time they were in China, did they live in Chung Hing Village?

A. That's right, sir.

Q. When is the first time you ever remember seeing Kwok Foo? When do you first recall?

A. You mean in the United States?

Q. No. The first time you ever remember seeing him.

Q. Kwok Foo? The first time? Well, we born in the same village and go to the same school. I see him all the time. [104]

Q. Did you always live with him?

A. Not always. Until he came to America.

Q. Did you live with him, as far as you can remember, all the time until he came to America?

A. Yes, sir.

Q. Did you live in the same house?

A. Same house.

Q. Did you identify the same person as your mother?

A. What do you mean?

Q. What was the name of your mother?

A. Yee Fong Yee.

Q. What was the name of his mother?

A. Yee Fong Yee, too.

Q. Was that the same person?

A. Oh, yes.

(Testimony of Wong Kwok Keung.)

Q. Were you living in your home in the village—— A. That's right.

Q. Wait. Were you living in your home in the village when your brother Kwok Wei was born?

A. Yes, I think so.

Q. Do you remember? A. Yes.

Q. Do you remember him being born?

A. You mean Kwok Wei? [105]

Q. Kwok Wei.

A. I don't remember the details, how he was, but I remember I and Kwok Foo were home at that time.

Q. Is the boy who is in the back room here today the same boy that was born in your village in CR 24, which is 1935 in the American calendar?

A. That's right, sir.

Q. Was that boy born to your mother?

A. Yes.

Q. What is the name of your father?

A. Wong Ho.

Q. What is the name of the father of Wong Kwok Wei? A. Wong Ho.

Q. The same person? A. Oh, yes.

The Court: I think we will take the afternoon recess now. We will now take a recess until 15 minutes after 3:00.

(Recess.)

Q. (By Mr. Hertogs): I will show you Plaintiffs' Exhibit No. 3-D for identification and ask you if you recognize that photograph. A. Yes.

Q. Who are those persons?

(Testimony of Wong Kwok Keung.)

A. My mother and me. [106]

Q. I will show you Plaintiffs' Exhibit 3-F for identification and ask you if you recognize the photograph on the second page thereof.

A. That is my picture.

Q. I will show you a card issued to you by Lingnan University? A. Yes.

Q. Does it have your name up there?

A. Yes.

Q. What name is there?

A. Wong Kwok Keung.

Q. I show you 3-G for identification and ask you if you have seen this letter before.

A. Yes.

Q. Whose picture is at the bottom?

A. My picture.

Q. Where did you get this letter?

A. From the head of the department of civil engineering at Lingnan University.

Mr. Hertogs: I will ask that Plaintiffs' Exhibit 3-D for identification, 3-F for identification, and 3-G for identification be admitted in evidence.

Mr. Dooley: No objection to 3-D.

The Court: It may be admitted.

Mr. Dooley: 3-F, defendant objects to [107] everything except the photograph.

The Court: Overruled. It may be admitted.

Mr. Dooley: That is objected to as being hearsay, irrelevant and immaterial.

3-G, defendant objects to everything except the photograph as being hearsay, irrelevant, immate-

(Testimony of Wong Kwok Keung.)

rial, and having no bearing whatsoever on the issues in this case.

The Court: Overruled. It may be received in evidence.

The Clerk: 3-D, 3-F, and 3-G in evidence.

(The exhibits referred to were received in evidence and marked as Plaintiffs' Exhibits 3-D, 3-F, 3-G.)

Q. (By Mr. Hertogs): Referring to Plaintiffs' Exhibit 3-H for identification, I will show you a group of envelopes. I don't know if they contain letters or not. They feel like it. Did you bring these envelopes to the American Consulate General at Hong Kong? A. Yes, sir.

Q. Can you tell me to whom these envelopes are addressed?

A. Yes. That is my father sent to my mother that one.

Q. That is the top one of the group?

A. Yes.

Q. That is the one with the stamp of June 17, 1946? A. Yes. [108]

Q. The second one, which has a stamp on the reverse side, May 3, 1948?

A. This my father sent to me.

Q. The third one, Los Angeles, December 27, 1949? A. This my brother sent to me.

Q. Which brother? A. Kwok Foo.

Q. The next one in line, which contains a stamp of January 5, 1950.

A. This my brother sent to me.

(Testimony of Wong Kwok Keung.)

Q. The next one, December 21, 1949.

A. This my brother sent to me.

Q. This one here that has a stamp dated March 13, 1950.

A. This my father sent to me.

Q. This one with the stamp of September 12, 1949.

A. This my father sent to me.

Q. And this one with the stamp January 17, 1950.

A. This my father sent to me.

Q. And the next one, January 20, 1950.

A. This my father sent to me.

Q. And the last one, with the stamp of February 6, 1950.

A. This my father sent to me.

Q. I refer particularly to the envelope dated [109] January 17, 1946. Where is this addressed to?

A. Kwan Tung, Toy Shan, Chew Ging Market, Wing Hong Sun. That is the store's name, because in the market only my father send a letter to the store and the store sent to my father.

Q. What is the next one?

A. Kwok Keung's mother.

Q. I refer to the one January 5, 1950, to what place is that addressed?

A. Canton.

Q. What is the rest of it?

A. That is the number of the house. It is the number of the house.

Q. To whom is this addressed?

A. This one from me.

Q. What is the name up here?

A. This is my name, Wong Kwok Keung.

Q. Who is the other name?

A. That means son.

(Testimony of Wong Kwok Keung.)

Q. Son of who?

A. My father call me son, Wong Kwok Keung, son, that is the translation.

Mr. Hertogs: I will ask that this group of envelopes be withdrawn from Plaintiffs' Exhibit 3-H for identification and that they be marked Plaintiffs' Exhibit 3-I. [110]

The Court: They may be marked.

The Clerk: That will be Exhibit 3-H-1.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit 3-H-1.)

Q. (By Mr. Hertogs): I will show you a group of receipts contained in Plaintiffs' Exhibit 3-H for identification. I will ask you if you presented this group of receipts to the American Consulate General at Hong Kong.

A. Yes, I present them.

Q. Were these in your possession?

A. No. I think my father kept them. I asked my father. I presented them to the Consulate.

The Court: Did you present them to the American Consul?

The Witness: Yes.

The Court: You took them there?

The Witness: I sent them to the Consul there because the Consul ask me for them.

Mr. Hertogs: I will ask this group be marked as Plaintiffs' Exhibit 3-H-2, and I will ask that they be admitted in evidence.

Mr. Dooley: Just a moment. May I ask one or two questions on voir dire?

(Testimony of Wong Kwok Keung.)

The Court: Yes. [111]

Voir Dire Examination

Q. (By Mr. Dooley): You got these receipts from whom when you presented them to the American Consulate? A. From my father.

Q. Did you receive the money indicated on all these receipts? A. Oh, yes.

Q. Will you look at them?

A. What year is that? I think so, sir.

Q. You are not sure?

A. Because it is a long time ago. I think I received all the money.

Mr. Dooley: No objection.

The Court: It may be received in evidence.

The Clerk: Exhibit 3-H-2.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit 3-H-2.)

Q. (By Mr. Hertogs): I will ask you if you would read the Chinese characters on this one that is dated 8/17/1945, by the payee's name. What name appears there?

A. Wong Kwok Keung accept.

Q. What address appears?

A. Canton, Toy Shan, Chew Ging Market, Hai Sun. That is the store's name. [112]

Q. The characters across the bottom down here which is by the remitter's name.

A. Wong Wo Hing.

Mr. Hertogs: I will ask the government to produce the Immigration file relating to the arrival record of Wong Kwok Hoy.

(Testimony of Wong Kwok Keung.)

I will ask that the file 7030/5636 relating to Wong Kwok Hoy be marked plaintiffs' exhibit next in order for identification.

The Court: It may be marked.

The Clerk: Plaintiffs' Exhibit 9 for identification.

(The file referred to was marked as Plaintiffs' Exhibit No. 9 for identification.)

Q. (By Mr. Hertogs): I will show you Plaintiffs' Exhibit 9 for identification and ask you if you recognize the picture of this person.

Q. Kwok Hoy.

Q. I will refer to Plaintiffs' Exhibit No. 2 for identification and ask you if you recognize this person.

A. Kwok Foo.

Q. In each case I am referring to the first photograph appearing in the file from the top thereof.

A. Yes.

Mr. Hertogs: I have no further questions of this witness, your Honor. [113]

The Court: Do you wish to postpone your cross examination?

Mr. Dooley: Yes, your Honor, I would like to postpone the cross examination.

The Court: All right.

(Witness withdrawn.)

Mr. Hertogs: I would suggest we use the interpreter with the next witness. He understands some English, but he can't speak it very fluently.

The Court: All right.

WONG HO

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified through the interpreter as follows:

The Clerk: Will you state your name?

The Witness: Wong Ho is my name.

Direct Examination

Q. (By Mr. Hertogs): Do you also have another name, Mr. Wong? A. Wong Ho Hing.

Q. Where are you residing at the present time?

A. I am living now in Los Angeles. [114]

Q. Where do you live in Los Angeles?

A. I couldn't pronounce the word, but I will write it. 3424 Edgehill Drive.

Q. I show you Plaintiffs' Exhibit No. 4 for identification and ask you if you recognize this document.

A. This is my certificate of identity.

Q. Is that your picture? A. Yes.

Q. Do you remember when and where you received this certificate?

A. In San Francisco.

Q. Do you recall about the approximate year?

A. About CR 3.

Mr. Hertogs: May we have the American date for that, Mrs. Chan?

The Interpreter: 1914.

Q. (By Mr. Hertogs): Are you married, Mr. Wong? A. Yes.

Q. What is the name of your wife?

A. Yee Fong Yee.

(Testimony of Wong Ho.)

Q. Where were you married?

A. In China.

Q. Where in China? A. Hoy Ping.

Q. What village in Hoy Ping? [115]

A. Wong Ock Village, Hoy Ping District.

Q. Do you know the date of your marriage?

A. First year of the Republic of China, 12th month, 10th day.

Mr. Hertogs: Will you give us the American date, please?

The Interpreter: January 16, 1913.

Q. (By Mr. Hertogs): At the time that you arrived at the Port of San Francisco in 1914, were you questioned and examined by the Immigration Service?

The Interpreter: He is answering the question by saying CR first year I left here to return to the old country.

Q. (By Mr. Hertogs): When you returned to the Port of San Francisco in 1914, were you questioned and examined by the Immigration Service?

A. Yes.

Q. At that time were you asked if you were married? A. Yes.

Q. Did you advise the Immigration and Naturalization Service that you were married?

A. Yes.

Q. How many times have you been married?

A. Once.

Q. Where is your wife at the present time?

A. In China, now in Hong Kong. [116]

(Testimony of Wong Ho.)

Q. Has she ever been to the United States?

A. No.

Q. After you returned to the United States in 1914, how many other trips did you make to China?

A. Two times more.

Mr. Hertogs: I will ask, Mr. Dooley, that you stipulate to the departure and arrival dates as reflected by the official records of the Immigration Service.

Mr. Dooley: Our records show he departed December 10, 1921.

The Court: Not so fast, Mr. Dooley. December what?

Mr. Dooley: December 10, 1921, and returned December 14, 1923.

Departed May 30, 1934, and returned June 23, 1937.

Mr. Hertogs: We will stipulate to those facts, your Honor.

Q. How many children have you and your wife had?

A. All together six.

Q. How many are boys and how many are girls?

A. All boys.

Q. What is the name of your oldest son?

A. Wong Loon Kwong.

Q. When was he born?

A. CR 2-11-10.

Mr. Hertogs: May we have it translated in English, please? [117]

The Interpreter: December 7, 1913.

Q. (By Mr. Hertogs): Where was he born?

A. Wong Oak Village, Hoy Ping.

(Testimony of Wong Ho.)

Q. Where is he at the present time?

A. He is now in Seattle.

Q. When did he come to the United States?

A. 1937.

Q. Does he have any family of his own in China? A. No.

Q. What is the name of your second son?

A. Wong Kwok Hoy.

Q. Where was Wong Kwok Hoy born?

A. Toy Shan, Chung Hing Village.

Q. What was the date of his birth?

A. CR 3-9-9.

Mr. Hertogs: The English, please?

The Interpreter: October 27, 1914.

Q. (By Mr. Hertogs): Where is Wong Kwok Hoy at the present time?

A. He is in Los Angeles now.

Q. Where does he live?

A. 206, his home is at West 10th Street, Los Angeles.

Q. Are you sure of that street?

A. Yes. [118]

Q. Does he own and operate a grocery store?

A. Main Street.

Q. What is the number?

A. South Main Street.

Q. What is the number on South Main Street?

A. 10420 South Main Street.

Q. How far does he actually live from that store at 10420 South Main Street?

A. About a block, about a block or so distance.

(Testimony of Wong Ho.)

Q. When did Wong Kwok Hoy come to the United States? A. 1933.

Q. Since his arrival in 1933, has he made any trips back to China? A. Yes.

Q. How many? A. Once.

Q. When did he go? A. 1947.

Q. How long did he stay in China?

A. Not quite two years.

Q. Do you recall the time he returned to the United States? A. The end part of 1949.

Q. Is that the only trip he has made since his arrival in 1933? [119] A. Yes.

Q. What is the name of your third son?

A. Wong Kwok Keung.

Q. Where was he born?

A. Chung Hing Village.

Q. What was the date of his birth?

A. He was born in 1922.

Q. Do you know the month and day?

A. Chinese month was ninth month, third day.

Mr. Hertogs: May we have the ninth month and third day converted to English in 1922, please?

The Interpreter: October 22, 1922.

Q. (By Mr. Hertogs): Where is Wong Kwok Keung at the present time? A. Here.

Q. Was he in the court room earlier today?

A. Yes.

Q. When did he come to the United States?

A. 1952.

Q. Do you remember the month?

(Testimony of Wong Ho.)

A. At that time it was about Chinese New Year's, I think, around February.

Q. Did anyone else come with him at that time?

A. No. 5 came with him.

Q. What is the name of your fourth son? [120]

A. Wong Kwok Foo.

Q. Where was he born?

A. Also in Chung Hing Village.

Q. What is the date of his birth?

A. 1923 is the year, Chinese month is eighth month, eighth day.

Mr. Hertogs: Will you convert that to English, please, for us?

The Interpreter: September 18th.

Q. (By Mr. Hertogs): Where is Wong Kwok Foo at the present time? A. In L. A.

Q. Where does he live?

A. The same place I am living now, 3424 Edgehill Drive.

Q. When did he come to the United States?

A. 1939.

Q. Since his arrival in 1939, has he made any trips back to China? A. Yes.

Q. How many? A. Once.

Q. When did he go? A. 1947.

Q. How long did he stay there?

A. Also not quite two years. [121]

Q. Do you know when he returned to the United States?

A. Same time as Hoy returned in 1949.

(Testimony of Wong Ho.)

Q. In other words, he and Hoy came back to the United States together? A. Yes.

Q. Was Wong Kwok Foo here in the court room earlier today? A. That is true.

Q. Did you bring Wong Kwok Foo to the United States as your son? A. Yes.

Q. What is the name of your fifth son?

A. Kwok Wei.

Q. Where was he born?

A. Also Chung Hing Village.

Q. What was the date of his birth?

A. 1935.

Q. What is the month and day?

A. Chinese date, third month, 28th day.

Mr. Hertogs: Will you give us the English, please?

The Interpreter: April 30, 1935.

Q. (By Mr. Hertogs): Where is Wong Kwok Wei living at the present time?

A. Also in L. A.

Q. With whom does he reside in Los Angeles?

A. The grocery with Hoy.

Q. Does anyone else live there?

A. Kwok Keung, also.

Q. Where do they live in relation to the grocery?

A. Back of the grocery store there is a house.

Q. When did he come to the United States?

A. At the time that Kwok Keung came.

Q. What is the name of your sixth son?

A. Wong Kwok Jin.

(Testimony of Wong Ho.)

Q. Where was he born?

A. Chung Hing Lee.

Q. When was he born?

A. 1937 is the year.

Q. The month and date, please?

A. Chinese month, first month, 10th day.

The Interpreter: February 20, 1937.

Q. (By Mr. Hertogs): Where does he reside at the present time?

A. In the village in China.

Q. At the time of your return to the United States on December 14, 1923, were you questioned and examined by the Immigration and Naturalization Service? A. Yes.

Mr. Hertogs: At this time I will ask the government to produce the signed statement made by the witness to [123] the Immigration and Naturalization Service at the time of his return on December 14, 1923.

I will ask that the Immigration and Naturalization Service, Seattle office, file 7030/6552 relating to Wong Ho be marked as plaintiffs' exhibit next in order for identification.

The Court: It may be marked.

The Clerk: Exhibit 10 for identification.

(The file referred to was marked as Plaintiffs' Exhibit No. 10 for identification.)

Q. (By Mr. Hertogs): I will show you Plaintiffs' Exhibit 10 for identification and I will show you a sheet which is marked, "Chinese landed direct from steamer on identification, No. 1033/3-4,

(Testimony of Wong Ho.)

SS" — there is a name I can't identify there, and dated December 14, 1923, and ask you if you recognize the signature at the bottom of that form.

A. Yes, that is my name.

Q. Is that your signature? A. Yes.

Q. At the time of your return to the United States on your next trip, June 23, 1937, were you questioned and examined by the Immigration Service? A. What year did you say?

Q. 1937. A. Yes. [124]

Q. Prior to making that trip to China, were you also questioned and examined by the Immigration Service when you applied for a citizen's return certificate? A. That's right, that's right.

Q. I show you a signature contained at the bottom of a statement taken at the Seattle office of the Immigration and Naturalization Service on May 29, 1934, contained in Plaintiffs' Exhibit No. 10 for identification and ask you if you recognize that signature. A. Yes, sir.

Q. Whose signature is that? A. Mine.

Q. I will also show you a sworn statement, Seattle, Washington, SS President Jackson, dated June 23, 1937, file No. 26803/17/14, contained in Plaintiffs' Exhibit No. 10 for identification, and ask you if you can identify the signature at the bottom of that page. A. Yes.

Q. Who is that?

A. Wong Ho, my signature.

Q. Did you sign that form? A. Yes.

(Testimony of Wong Ho.)

Mr. Hertogs: I will ask that Plaintiffs' Exhibit No. 10 be admitted in evidence.

Mr. Dooley: Your Honor, defendant objects for the [125] same reason as before. With respect to the particular documents that are identified, they might be perhaps separated and a different ruling made on each. However, all of the entire file contains a lot of hearsay material and various statements that the witness may have made at one time, and while they might be used for proper impeachment, certainly they don't constitute substantive evidence.

Mr. Hertogs: I will withdraw the request.

I will ask one be marked 10-A, 10-B, and the third one 10-C, and that those three which I have referred to and presented to the witness for examination and identification as to signature be admitted in evidence.

The Court: Such may be the order.

The Clerk: Exhibits 10-A, 10-B and 10-C.

(The exhibits referred to were received in evidence and marked as Plaintiffs' Exhibits 10-A, 10-B and 10-C.)

Mr. Dooley: Defendant also objects to those as being hearsay and self-serving statements previously made.

The Court: Overruled.

Mr. Dooley, I don't see how the government can in good conscience object to the records they made. They are the ones who made the records. It is on that that they base their opinion.

Mr. Dooley: Your Honor, they can be used for impeachment, [126] but the witness is before the court and if he testifies that this person is his child, I mean he can't impeach himself, nor can he build up his testimony by recounting at a previous time he made a statement.

The Court: Can't they show that 10 years ago or 20 years ago they testified exactly the same way?

Mr. Dooley: I think that is self-serving, your Honor. It is a prior consistent statement.

The Court: We don't see this eye to eye, Mr. Dooley.

Mr. Dooley: No, your Honor.

The Court: Objection overruled. They may be received in evidence.

How much more have you got of this witness?

Mr. Hertogs: Probably it will take 45 minutes or more, your Honor. We haven't even started with the exhibits.

The Court: Are we going to be able to finish this case tomorrow?

Mr. Dooley: How many more witnesses do you have?

Mr. Hertogs: I have the other plaintiff and one more brother.

Mr. Dooley: It seems doubtful.

The Court: Then we better continue with this witness. I like to quit at 4:00 o'clock.

Mr. Hertogs: There aren't very many witnesses in [127] the other case.

The Court: It won't take as long?

Mr. Hertogs: No, it will not. Even one of the

plaintiffs has now passed away. There is only one plaintiff left.

The Court: I am willing to quit now, but you are the ones that are going to have to estimate the time. I want to finish up Friday night.

Mr. Hertogs: We will do our best to see we are finished by Friday night.

The Court: Do you want to quit now?

Mr. Dooley: I prefer to go on. In fact, if we could finish tomorrow, I thought we could finish the other case Thursday. I have a case before Judge Byrne that he wants me to try on Friday.

The Court: Then maybe you will cut out some of your cross examination.

Mr. Dooley: I just learned a few minutes ago that Judge Byrne did want me.

The Court: You tell Judge Byrne I have prior rights.

Court will now stand in recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken to 10:00 o'clock, a.m., Wednesday, January 23, 1957.) [128]

January 23, 1957, 10:00 o'clock, a.m.

The Clerk: Wong Kwok Keung and Wong Ho as guardian ad litem of Wong Kwok Wei, vs. John Foster Dulles, further trial.

The Court: Are you ready?

Mr. Hertogs: Ready, your Honor.

Mr. Dooley: Ready.

The Court: You may proceed.

WONG HO

the witness on the stand at the time of the adjournment, being previously duly sworn, was examined and testified further through the interpreter as follows:

Direct Examination—(Continued)

Q. (By Mr. Hertogs): I will show you Plaintiffs' Exhibit No. 1 and ask you if you recognize the picture of the person thereon.

A. Wong Kwok Foo.

Q. Who is Wong Kwok Foo?

A. The fourth boy of mine.

Q. I believe you identified Plaintiffs' Exhibit No. 4 for identification, but once again would you identify the picture on that document.

A. Myself, Wong Ho. [131]

Mr. Hertogs: I will ask that it be admitted in evidence, your Honor.

The Court: It may be admitted. What is the number?

Mr. Hertogs: 4, your Honor.

The Clerk: Exhibit 4.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit No. 4.)

Q. (By Mr. Hertogs): I will show you Plaintiffs' Exhibit No. 5 and ask you if you recognize the photograph at the bottom of the first page.

A. Wong Kwok Keung, No. 3 son.

Q. I show you Plaintiffs' Exhibit No. 6 for identification and ask you if you recognize the photograph at the bottom of that document.

(Testimony of Wong Ho.)

A. Wong Kwok Wei, No. 5 son.

Q. I show you Plaintiffs' Exhibit No. 7 and ask you if you recognize the photograph of the boy on the second page. A. Wong Kwok Keung.

Q. I show you Plaintiffs' Exhibit No. 8 for identification and ask you if you recognize the photograph on the second page of that document.

A. Wong Kwok Wei.

Q. I show you Plaintiffs' Exhibit No. 2 for identification, the first picture contained in that file, and ask you if [132] you recognize that person.

A. Wong Kwok Foo, No. 4.

Q. When did Wong Kwok Foo come to the United States? A. 1939.

Q. At what port did he arrive?

A. Seattle.

Q. At the time he arrived at the Port of Seattle in 1939, did you appear and testify in his behalf?

A. Yes.

Q. At that time were you examined extensively concerning the various members of your family?

A. Yes.

Q. I will show you a signature contained at the bottom of page 14 of the transcript of the hearing taken at the Port of Seattle, Washington, Immigration and Naturalization Service, on August 2, 1939, and ask you if you recognize that signature.

A. That is my signature.

Q. I will show you Plaintiffs' Exhibit No. 9 for identification, and the first picture contained in that file, and ask you if you recognize that photograph.

(Testimony of Wong Ho.)

A. Wong Kwok Hoy.

Q. Who was Wong Kwok Hoy?

A. My second boy.

Q. When did Wong Kwok Hoy come to the United States? [133]

A. 1933.

Q. At what port did he arrive?

A. Also Seattle.

Q. At the time Wong Kwok Hoy arrived at the Port of Seattle in 1933, did you appear and testify in his behalf?

A. Yes.

Q. I will show you a signature contained in the middle of page 24 of the transcript of hearing at Seattle, Washington, on July 17, 1933, and ask you if you can recognize that signature.

A. Yes.

Q. At the time you appeared and testified at the Port of Seattle, Washington, in 1933, in connection with the arrival of Wong Kwok Hoy, were you questioned extensively concerning your family?

A. That's right, true.

Q. I will show you Plaintiffs' Exhibit No. 3-A and ask you if you can recognize the picture on the reverse side thereof.

A. Wong Kwok Wei.

Q. Who is Wong Kwok Wei?

A. No. 5 son.

Q. I will show you Plaintiffs' Exhibit No. 3-B and ask you if you can recognize the photograph on the reverse side thereof. [134]

A. Wong Kwok Keung, No. 3.

Q. I show you Plaintiffs' Exhibit No. 3-C and ask you if you have ever seen that photograph before.

A. Yes.

(Testimony of Wong Ho.)

Q. Do you know the people in that photograph?

A. Yes.

Q. Would you identify these people, if you can, left to right? This one on the left-hand side in the white shirt?

A. Wong Kwok Foo on the left side.

Q. Who is this person in the back, in the middle? A. Myself.

Q. And the person directly in front of you?

A. My wife.

Q. And the person in the white shirt on the right-hand side of the photograph?

A. Wong Kwok Keung on the right.

Q. I show you Plaintiffs' Exhibit No. 3-D and ask you if you can recognize those people.

A. Left side sitting down is my wife facing the picture. I think it is Kwok Keung standing up there.

Mr. Dooley: He said he thought it was?

The Witness: Kwok Keung.

Q. (By Mr. Hertogs): Have you ever seen that photograph before? A. No. [135]

Q. I show you Plaintiffs' Exhibit No. 3-E and ask you if you can recognize any people in that photograph. A. I think so.

Q. You will notice in that photograph we have placed little numbers above each person. Will you lean over so you can get more light? Can you tell me the name of the person directly under No. 1?

A. Wong Kwok Keung.

Q. The person right directly under the figure 2?

(Testimony of Wong Ho.)

A. Wong Kwok Foo.

Q. The person directly under No. 3?

A. Kwok Hoy.

Q. The person way over here at the left-hand side under No. 4? A. Kwok Foo's wife.

Q. The little child she is holding marked No. 5?

A. Son of Kwok Foo.

Q. The person here by No. 6?

A. Kwok Keung's wife.

Q. The person directly under No. 7?

A. Kwok Jin.

Q. No. 8, the person directly underneath here?

A. My wife.

Q. The little child down here with a 9 written on him?

A. I think it is Kwok Keung's son, Sol Bing.

Q. No. 10? A. Kwok Hoy's wife.

Q. No. 11, the child she is holding?

A. Kwok Hoy's child.

Q. No. 12, way over here on the right-hand side?

A. Kwok Wei, No. 5 son.

Q. I show you Plaintiffs' Exhibit No. 3-F and ask you if you can recognize the photograph of that person. A. Kwok Keung.

Q. I show you 3-G and ask you if you can recognize the photograph of that person.

A. Kwok Keung.

Q. Now, I show you Plaintiffs' Exhibit 3-H-1. Do you recognize any of those envelopes?

A. This one is sent by me.

(Testimony of Wong Ho.)

Q. You are referring to the one bearing the postmark June 17, 1946? A. Yes.

Q. To whom was that written?

A. To my wife.

Q. Do you recognize this one, bearing postmark May 8, 1948? A. Yes, also mine.

Q. Who is that written to?

A. Kwok Keung. [137]

Q. Do you recognize this one bearing date of December 27, 1949? A. I think Kwok Foo.

Q. Do you recognize that one bearing postmark dated January 9, 1950? A. This is mine.

Q. Who is that to? A. Kwok Keung.

Q. Do you recognize this one bearing the date of December 31, 1949? A. Also mine.

Q. Who is it written to?

A. Kwok Keung again.

Q. This one bearing date of March 13, 1950, do you recognize that? A. Also sent by me.

Q. To whom? A. Kwok Keung.

Q. Do you recognize this one bearing date September 12, 1949?

A. Also for Kwok Keung.

Q. This one bearing date January 17, 1950?

A. Also mine to Kwok Keung.

Q. This one bearing date January 20, 1950?

A. For Kwok Keung, the same. [138]

Q. This one bearing date of February 6, 1950?

A. Yes, also to Kwok Keung.

Q. Did you purchase and transmit money orders to any members of your family in China?

(Testimony of Wong Ho.)

A. Yes.

Q. I show you Plaintiffs' Exhibit 3-H-2 and ask you if you recognize any of these.

A. That is mine.

Q. Your what?

A. I sent back to Kwok Keung.

Q. Do you recognize this one?

A. Yes, also Kwok Keung.

Q. Did you send the money? A. Yes.

Q. Did you purchase the original?

A. Yes. This is the duplicate.

Q. I show you the next one.

A. Also the same.

Q. Did you purchase that for Kwok Keung?

A. This is the duplicate of the original.

Q. I will show you the next one.

A. The same thing, for the same purpose.

Q. Are the others the same?

A. Yes, for expense or tuition sent back to Kwok Keung. [139]

And this is also for Kwok Keung. That includes for the family expenses and tuition, whatever they need in China.

Q. Referring to Exhibit 3-B once again, are you the father of that boy? A. Yes.

Q. Who is the brother of that boy?

A. Yee Shee or Yee Fong Yee.

Q. Is that your wife? A. Yes.

Q. Who is the father of the child whose picture appears on Exhibit 3-A?

A. This is Kwok Wei. He is my fifth son.

(Testimony of Wong Ho.)

Q. Are you the father? A. Yes.

Q. Who is the mother of that child?

A. Yee Fong Yee.

Q. Is that your wife? A. Yes.

Q. Were you in China at the time that boy was born? A. Yes.

Q. Were you in China at the time that this boy whose picture appears on 3-B was born?

A. Yes.

Mr. Hertogs: I have no further questions of this witness, your Honor. [140]

The Court: All right. Step down.

(Witness withdrawn.)

WONG KWOK WEI

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Wong Kwok Wei.

Direct Examination

Q. (By Mr. Hertogs): It is going to be necessary for Mr. Dooley over here to hear you, so you will have to speak up so he can hear you.

A. All right.

Q. Where do you live? A. Right now?

Q. Yes. A. 10420 South Main Street.

Q. With whom do you reside at that address?

A. My brother.

Q. What brother?

(Testimony of Wong Kwok Wei.)

A. Second and third one.

Q. What is the name of your second brother

A. Wong Kwok Hoy. [141]

Q. What is the name of your third one?

A. Wong Kwok Keung.

Q. Where were you born? A. In China.

Q. In what village?

A. In Chung Hing Lee, Chung Hing Village.

Q. What is the date of your birth?

A. Should I say in my own language?

Q. Whatever you want.

A. In Chinese calendar?

Q. Yes. A. 24-3rd-28.

Q. Do you know it in American reckoning?

A. Oh, yes.

Q. What is it?

A. 1935-4-30, I mean the fourth month and 30th.

Q. Day? A. Yes.

Q. When did you come to the United States?

A. Almost five years ago.

Q. With whom did you come?

A. My brother.

Q. What brother? A. Third one.

Q. What is his name? [142]

A. Kwok Keung.

Q. What is the name of your father?

A. Wong Ho.

Q. I will show you Plaintiffs' Exhibit No. 4 and ask you if you recognize this person.

A. Let me see it? He seems like my father, I mean his face, that's right.

(Testimony of Wong Kwok Wei.)

Q. Where does your father live at the present time?

A. At the present time live at 3424 Edgehill Drive.

Q. Is that in Los Angeles?

A. Yes, in Los Angeles.

Q. With whom does your father reside at that address? A. My brother.

Q. What is his name?

A. Wong Kwok Foo.

Q. Was your father in this court room earlier today? A. Yes, sir.

Q. Is he the person that just left the witness stand? A. Yes, sir.

Q. What is the name of your mother?

A. Yee Fong Yee.

Q. Where is she?

A. She is in Hong Kong.

Q. When was the last time you saw her?

A. In my calendar, I say 39, the last month.

Mr. Hertogs: May we have that in English, Mrs. Chan?

The Interpreter: 1950, approximate date—no, 1951, between January and February of 1951. That would be the 12th month of the Chinese calendar.

Q. (By Mr. Hertogs): How many brothers and sisters do you have? A. I got six brothers.

Q. Is that including yourself?

A. Including myself.

Q. What is the name of your first brother?

A. Wong Loon Kwong.

(Testimony of Wong Kwok Wei.)

Q. Where is he?

A. He is in Seattle.

Q. What is the name of your second brother?

A. Wong Kwok Hoy.

Q. Where is he at the present time?

A. Los Angeles.

Q. Was he outside the court room here this morning?

A. Yes, sir.

Q. Where was he born?

A. He was born in China.

Q. What is the name of his village where he was born?

A. Same as mine.

Q. About how old is Kwok Hoy? [144]

A. Kwok Hoy is, let's see, about 43, I think.

Q. What is the name of your third brother?

A. Third brother, Wong Kwok Keung.

Q. And where is Wong Kwok Keung?

A. Right here.

Q. Did he testify yesterday?

A. Yes, sir.

Q. Where was he born?

A. In China.

Q. What village?

A. Same as mine.

Q. How old is Wong Kwok Keung?

A. Wong Kwok Keung is 35.

Q. What is the name of your fourth brother?

A. Wong Kwok Foo.

Q. Where does Wong Kwok Foo reside?

A. In Los Angeles.

Q. Where was he born?

A. In China.

Q. What village?

A. Same as mine.

Q. How old is he?

A. 34.

Q. What is the name of your fifth brother?

(Testimony of Wong Kwok Wei.)

A. Wong Kwok Wei. [145]

Q. Is that you? A. Yes, that is me.

Q. What is the name of your sixth brother?

A. Wong Kwok Jin.

Q. Where was he born? A. In China.

Q. What Village? A. Chung Hing.

Q. Where is he at the present time?

A. In China.

Q. Has he ever been to the United States?

A. No, sir.

Q. When did your brother Wong Kwok Hoy come to the United States?

A. Oh, I don't know. Some way before I do, some long ago.

Q. Did your brother Wong Kwok Foo come to the United States? A. Before I do, too.

Q. I will show you Plaintiffs' Exhibit 3-A and ask you if you recognize the picture on the reverse side thereof. A. Yes, that is me.

Q. Is that your signature up here at the top?

A. Oh, yes.

Q. Did you sign that at the American Consulate at Hong [146] Kong?

A. I don't know where I signed it. That is my signature. That is it.

Mr. Hertogs: I will ask that it be admitted in evidence, your Honor.

The Court: It may be admitted.

The Clerk: 3-A.

(The exhibit referred to was received in

(Testimony of Wong Kwok Wei.)

evidence and marked as Plaintiffs' Exhibit No. 3-A.)

Q. (By Mr. Hertogs): I show you a picture on 3-B and ask if you recognize that.

A. My third brother.

Q. What is his name? A. Kwok Keung.

Q. I show you Plaintiffs' Exhibit 6 for identification and ask you if you recognize that photograph. A. Oh, yes.

Q. Who is that? A. That is me.

Mr. Hertogs: I will ask that Plaintiffs' Exhibit No. 6 for identification be admitted in evidence.

The Court: It may be admitted.

The Clerk: Exhibit 6.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit No. 6.)

Q. (By Mr. Hertogs): I show you Plaintiffs' Exhibit No. 1 and ask you if you recognize the person whose pictures appears thereon.

A. That is my fourth brother.

Q. What is his name? A. Kwok Foo.

Q. I show you Plaintiffs' Exhibit No. 5 and ask you if you recognize that photograph. A. Yes.

Q. Who is that? A. My third brother.

Q. I show you Plaintiffs' Exhibit 7 and ask you if you recognize the photograph on the second page. A. Yes.

Q. Who is that?

A. My brother, like this one.

Q. What is his name? A. Kwok Keung.

(Testimony of Wong Kwok Wei.)

Q. I show you Plaintiffs' Exhibit No. 8 for identification and ask you if you recognize the photograph. A. That is me.

Q. Is that your name on the outside of that document? A. Oh, yes.

Mr. Hertogs: I will ask it be admitted in evidence, your Honor. That is No. 8. [148]

The Court: It may be admitted.

The Clerk: Exhibit 8.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit No. 8.)

Mr. Dooley: Just a moment, your Honor. The defendant objects to Exhibit 8, anything except the photograph.

The Court: Overruled.

Q. (By Mr. Hertogs): I show you Plaintiffs' Exhibit No. 3-C and ask you if you can recognize those people.

A. Yes, I recognize this. This is my brother, this my father.

Q. Are you pointing to the two people in the middle? A. Yes.

Q. Can you tell me who this is over on the left-hand side? A. I think my fourth brother.

Q. What is his name? A. Kwok Foo.

Q. Can you tell me who this is on the right-hand side? A. I think my third brother.

Q. What is his name? A. Kwok Keung.

Q. I show you Exhibit 3-D and ask you if you can recognize those photographs. A. Oh, yes.

Q. Who are they from left to right? Who is

(Testimony of Wong Kwok Wei.)

the person sitting? A. My mother.

Q. Who is standing up?

A. My brother.

Q. What brother? A. Third one.

Q. What is his name? A. Kwok Keung.

Q. I will show you No. 3-E and ask you if you can recognize any of the people in this photograph.

A. I recognize all of them.

Q. You have seen that photograph before?

A. Yes.

Q. I have numbered these different ones here. We will start where I have got the numbering for the person under No. 1. A. Third brother.

Q. His name? A. Kwok Keung.

Q. The one under No. 2?

A. Fourth brother.

Q. What is the name? A. Kwok Foo.

Q. The one over under No. 3? [150]

A. Second brother.

Q. His name? A. Kwok Hoy.

Q. The person under No. 4 here?

A. My sister-in-law.

Q. Your sister-in-law, and who is she married to? A. Married to this guy.

Q. What is his name? What is the name of her husband? A. Kwok Foo.

Q. Who is this child she is holding, under No. 5? A. His son.

Q. Whose son? A. My fourth brother.

Q. This person by No. 6?

A. My third brother's wife.

(Testimony of Wong Kwok Wei.)

Q. What is her name? A. Yee Ling Hun.

Q. That is her name? A. Yes.

Q. Who is she married to?

A. Kwok Keung.

Q. No. 7? A. My brother, small one.

Q. What is his name? [151] A. Kwok Jin.

Q. No. 8? A. My mother.

Q. She is holding a child marked 9.

A. Yes.

Q. Who is he?

A. My third brother's son.

Q. Your third brother's son. This person by No. 10? A. My second brother's wife.

Q. What is your second brother's name?

A. Second brother?

Q. Yes. A. Wong Kwok Hoy.

Q. She is holding a child we have marked No. 11. A. That is his son.

Q. Who are you referring to?

A. My brother, second brother.

Q. No. 12 here? A. That is me.

Mr. Hertogs: I have no further questions of this witness, your Honor.

The Court: Is your other witness here?

Mr. Hertogs: He will be back shortly. He had to go to the bank. [152]

Cross Examination

Q. (By Mr. Dooley): Your name is Mr. Wong?

A. Yes, sir.

(Testimony of Wong Kwok Wei.)

Q. Do you know the birthday of your No. 1 brother? A. The birthday?

Q. Yes. A. The year, too?

Q. The year.

The Court: The year and the date?

Mr. Dooley: Yes.

The Witness: Chinese calendar second year, 11th month and 10th day.

Mr. Dooley: May I have the American translation?

The Interpreter: December 7, 1913.

Q. (By Mr. Dooley): The birthday of your No. 2 brother? A. Just birthday?

Q. Yes.

The Court: Mr. Dooley, he is going to give you the birthday, the day and the month.

Mr. Dooley: And the year.

The Court: What you want is the date of birth. You have a birthday every year. You want the date of birth, don't you?

Mr. Dooley: The birth date. [153]

The Court: You understand, the birth date, the day of birth.

The Witness: Yes. The day of birth, ninth month and the ninth day, too.

Q. (By Mr. Dooley): And the year?

A. The third.

Mr. Dooley: May I have a translation?

The Interpreter: 27th of October, 1914.

Q. (By Mr. Dooley): And your No. 3 brother?

A. The year 11, ninth month, the third.

(Testimony of Wong Kwok Wei.)

Mr. Dooley: May I have a translation of that?

The Interpreter: October 22, 1922.

Mr. Dooley: And your No. 4 brother?

The Witness: The No. 4 brother is 12th year, 8th month, and 8th day, too.

Mr. Dooley: A translation?

The Interpreter: September 18, 1923.

Q. (By Mr. Dooley): Your No. 5 brother?

A. No. 5 brother?

Q. Yes. A. 1935, fourth month, 30th.

Q. You are No. 5, aren't you?

A. Yes, I am No. 5.

Q. What was the month and the year?

A. April 30th. That is the American date. [154]

Q. What is the Chinese date again?

A. Third month, 28th.

Q. When did you first learn your birth date, Mr. Kwok Wei?

A. What do you mean by that, sir?

Q. When did you first learn you were born CR 24-3-28? A. When I first learn it?

Q. Yes. A. I don't know, sir.

Q. You don't remember when your mother first told you your date of birth?

A. No, I don't remember, sir.

Q. Do you remember approximately when?

A. I don't know, sir.

Q. Your No. 6 brother?

A. My sixth brother, 26, first month, 10th day.

Mr. Dooley: May we have a translation on that?

The Interpreter: 20th of February, 1937.

(Testimony of Wong Kwok Wei.)

Q. (By Mr. Dooley): How much older is your No. 2 brother than you are, Mr. Wong?

A. My No. 2 brother, about 21 years.

Q. Is it necessary for you to count?

A. Oh, yes, I have to count.

Q. How much older is your No. 3 brother than you?

A. My 3 brother than I, 13 years. [155]

Q. How much older is your No. 1 brother?

A. About 22 years.

Q. He is about 22 years older than you?

A. Yes, sir.

Q. When is the first time you remember seeing your father?

A. What are you referring to, sir?

Q. When do you first recall, first remember seeing your father Wong Ho?

A. Wong Ho? When I come to America.

Q. You don't remember him before you came to America?

A. Well, I see his picture on the wall, but I don't see he personally.

Q. When is the first time you remember seeing your No. 1 brother?

A. In my laundry store in San Francisco.

Q. When was that?

A. The first day I came.

Q. That was in 1952?

A. Yes.

Q. When is the first time you remember seeing your No. 4 brother?

A. Fourth brother, 1952.

Q. When is the first time you remember seeing your No. 2 brother? [156]

A. Same year, 1952.

(Testimony of Wong Kwok Wei.)

Q. When is the first time you remember seeing your No. 6 brother?

A. In the year of my Chinese calendar 39 years.

Q. When is the first time you remember seeing your No. 3 brother? A. All the time.

Q. So the first time you saw your No. 4 brother, your No. 2 brother and your No. 1 brother was in 1952? A. Yes, sir.

Q. You had never seen them before in your life?

The Court: Well, now, Mr. Dooley——

The Witness: No——

The Court: Just a minute. Mr. Dooley, let's change that a little bit. I think the question is, you never remember seeing them, because the chances are that if he was very young he might have seen them, but he can't remember.

Mr. Dooley: That was the question.

The Court: But that is not the way you phrased it.

Mr. Dooley: I said, "When do you first remember seeing him," and he said 1952.

The Court: What is the first time? You don't remember seeing them until you came to America.

The Witness: I see the second one and the fourth one when he go back to China. [157]

The Court: I am talking about your No. 1 and your No. 4 and your No. 2. You don't remember seeing them in China?

The Witness: Yes, I remember my second one

(Testimony of Wong Kwok Wei.)

and fourth one. The first one I never seen until America.

The Court: When did you first see your No. 2 brother?

The Witness: In China.

The Court: Whereabouts?

The Witness: You mean what year?

The Court: What year and where was it?

The Witness: In my home.

The Court: In the village?

The Witness: In the village, yes.

The Court: How old were you at that time?

The Witness: Let's see. About 14 years old.

The Court: Where do you remember seeing No. 4?

The Witness: Same year. When I was 14.

The Court: In the village?

The Witness: Yes.

The Court: So you never saw your No. 1 brother in the village?

The Witness: Never.

The Court: But you saw the others?

The Witness: In the village? [158]

The Court: In the village.

The Witness: That's right.

Mr. Dooley: Your Honor, may I have the reporter read the question I asked the witness a few moments ago back?

The Court: How far do you want to go back?

Mr. Dooley: When I ask when he first remembered seeing his No. 4 and No. 2.

(Testimony of Wong Kwok Wei.)

The Court: Well, he stated he hadn't seen his No. 4 and No. 2 until he came to America in 1952. Now he says he remembers seeing them in China. It may have been he didn't understand your question, Mr. Dooley.

Mr. Dooley: It may be.

The Court: I think that is something for the court to judge.

Mr. Dooley: Yes, your Honor.

The Court: I suppose the only reason you want to have the question read back is to be sure I **am** impressed with the discrepancy. I have got the discrepancy, if it is a discrepancy.

Mr. Dooley: I wanted to make sure I asked it the way I thought I asked it. I wasn't sure.

The Witness: My point is, when you asked me before I come to America or before—I mean after I came to America or before I came to America. You didn't mention seeing. I thought you first meant when I come to America to see him and [159] that is in 1952.

Q. (By Mr. Dooley): When is the first time you remember seeing your No. 3 brother?

A. I remember him all the time, sir.

Q. You remember being in the village with your No. 3 brother? A. Yes, sir.

Q. Throughout your life? A. Yes, sir.

Q. How old were you when you first remember seeing your No. 3 brother?

A. The day I was born.

Q. You don't remember the day you were born, do you?

(Testimony of Wong Kwok Wei.)

A. Well, I live with him all the time, sir, except when he go to school and he live in the school, see.

Q. When did he go to school?

A. Oh, I don't know when, sir.

Q. You don't know when he went to school?

A. Before I was born he went to school already, see.

Q. In fact, he was in school when you first knew him?

A. When I go to school, he go to college, and that's all I knew.

Q. Was he going to school in the village?

A. In the village?

The Court: Mr. Dooley, this witness certainly can't [160] be called upon to recollect things that happened some years before he was born.

Mr. Dooley: No. I am talking about after he was born, not before he was born.

The Court: I don't know. I can't keep up with your questions.

Mr. Dooley: I am asking the witness, your Honor——

The Court: You are going too fast.

Mr. Dooley: Well, I will slow down, your Honor, because I would like to get this clear.

Q. When you first began to recognize your mother and father, was your No. 3 brother, recognize your mother, was your No. 3 brother in the village? A. When I know.

Q. Yes, was your No. 3 brother in the village at that time? A. I think so.

(Testimony of Wong Kwok Wei.)

Q. You stated your No. 3 brother went to school?

A. Yes.

Q. When did your No. 3 brother go to school?

A. You mean when?

Q. Yes. A. I don't know when.

The Court: Just a minute. I think you ought to change that. When do you remember he went to school?, because [161] he went to school before he was born.

Q. (By Mr. Dooley): When do you remember your No. 3 brother going to school?

A. Before I go to school and after I go to school, he still go to school, see.

Q. When did you start to school?

A. In 1931—I mean in Chinese calendar 31.

Q. You started in CR 31? A. Yes, sir.

Mr. Dooley: May I have that in English?

The Interpreter: 1942 or early in 1943.

Q. (By Mr. Dooley): Was your No. 3 brother in the village at that time?

A. At that time, my 3 brother?

Q. When you started to school. A. Oh, yes.

Q. How long did your No. 3 brother stay in the village after you started to school?

A. When I was in second grade, he went to school for a year, and then he come back, and then after the war he going to school.

Q. How old were you when you started to school? A. Eight years old.

Q. Now, you said after you were in the second

(Testimony of Wong Kwok Wei.)

grade, your No. 3 brother went to school for a year and then came [162] back.

A. Yes. I don't know about——

Q. Where did your No. 3 brother go to school?

A. Oh, far away from the village, sir.

Q. Do you know where he went to school?

A. I heard the name of Cho Gong, something like that.

Q. How old were you when you were in the second grade? A. Going nine years.

Q. After your brother came back, did he stay in the village? A. Yes.

Q. He never left the village again?

A. What do you mean, sir? Right now he is not in the village.

Q. He never left the village before he came to Hong Kong to come to the United States?

The Court: Mr. Dooley, are you talking about No. 3 brother?

Mr. Dooley: Yes, your Honor.

The Court: You say he never left the village. He was 13 years old when this boy was born. Now, these questions are too broad. I think you could ask this witness if he ever remembered that he left the village, but bring it within his own memory. You are asking him to testify to something he can't remember. If he testifies, it is purely hearsay unless [163] he can remember.

Mr. Dooley: I intend to say after his brother came back from this one year in school in Cho

(Testimony of Wong Kwok Wei.)

Gong, did he leave the village again before he came to the United States.

The Witness: Yes, sir.

Q. (By Mr. Dooley): Your No. 3 brother?

A. Yes.

Q. Did he? A. Yes, he did.

Q. When did he leave?

A. Oh, after the war, I mean our country's war.

Q. After the war? A. Yes.

Q. What year was that?

A. Chinese calendar 34.

Q. How old were you at the time he left the village after the war?

A. About 12 or 13 years old.

Q. You were about 12 or 13 years old?

A. Yes.

Mr. Dooley: May I have a translation of this CR 34 that he gave a few moments ago?

The Interpreter: 1945 or 1946.

Q. (By Mr. Dooley): And when he left the village after the war, how long did he stay away from the village? [164]

A. Stay away from the village? Four years, about.

Q. About four years? A. Yes.

Q. How old were you when your No. 3 brother returned to the village after staying away about four years?

A. About 15 or 16, something like that.

Q. 15 or 16?

A. Something like that.

(Testimony of Wong Kwok Wei.)

Q. In what year did your No. 3 brother return to the village after staying away about four years?

A. Chinese calendar 38.

The Interpreter: 1949 or 1950.

The Court: Mr. Dooley, it's 11:00 o'clock, and while you are looking for your next question, we will take our morning recess. We will now recess until 15 minutes after 11:00.

(Recess.)

The Court: You may proceed.

Mr. Dooley: Your Honor, the other witness is here. I can finish cross examination of the——

The Court: You are not going to take long with this one, are you?

Mr. Dooley: This particular witness, I will.

The Court: Do you want the other witness?

Mr. Hertogs: It doesn't make any difference.

The Court: Do you want this other witness to get back?

Mr. Hertogs: No. The other boy is at the store now.

The Court: Then let's complete this cross examination.

Q. (By Mr. Dooley): You testified your No. 3 brother left the village after the war and stayed about four years, is that correct?

A. Three or four years, I would say.

Q. Where did he go——

The Court: Mr. Dooley, you have asked that question. He has already given you an answer, when he left, how long he was gone, and when he re-

(Testimony of Wong Kwok Wei.)

turned. Now, let's get on, and don't ask the questions again.

Mr. Dooley: I don't believe he stated where he went.

The Court: I thought you said when.

Mr. Dooley: No, where.

The Court: Excuse me. I didn't understand.

Q. (By Mr. Dooley): Where did your No. 3 brother go? A. He go to school.

Q. Where? A. In Canton.

Q. While he was going to school in Canton, did he come [166] back to the village at any time?

A. Oh, yes, during the summer time and the end of the term.

Q. During the summer and the end of the term, did you ever go to Canton to see him in school?

A. No, sir.

Q. Do you know how far Canton is from Chung Hing Village? A. I don't know, sir.

Q. Have you ever been to Canton?

A. Once on the way to go there, not stop there. When I go to Hong Kong, the ship stopped by Canton, but I didn't go up there.

The Court: That is the only time you were in Canton?

The Witness: Yes.

Q. (By Mr. Dooley): When was the first time you ever had a picture taken, Mr. Wong?

A. In my calendar, 38.

Mr. Dooley: What would that be?

(Testimony of Wong Kwok Wei.)

The Interpreter: 1949 or 1950.

Q. (By Mr. Dooley): I show you Plaintiffs' Exhibit 6 and refer to the photograph on this exhibit and ask you if you know when that photograph was taken. A. When?

Q. Yes. [167]

A. I don't know when, sir.

Q. Do you know how old you were at the time this photograph was taken?

A. About 15 or 16.

Q. I show you Plaintiffs' Exhibit 3-E and ask you if you know when Exhibit 3-E was taken.

A. When?

Q. Yes.

A. In the Chinese calendar year 38.

Q. How old were you at the time Exhibit 3-E was taken?

A. How old? Let's see. About 14 or 15, something like that.

Q. Were you the same age at the time Exhibit 3-E was taken as——

A. No, not at the same time, sir.

The Court: Just a minute now, Mr. Dooley, this record may have to be read by the Circuit and you ought to finish a question before the witness answers. So you better wait until after the question is complete. Now go back and complete your question.

Q. (By Mr. Dooley): Were you the same age at the time Exhibit 3-E was taken as you were at

(Testimony of Wong Kwok Wei.)

the time the photograph on Exhibit 6 was taken?

A. Not at the same time, sir.

Q. How much older were you at the time that Exhibit 6 [168] was taken?

A. Either one or two years.

Q. Just a moment. How much older were you at the time the photograph on Exhibit 6 was taken than you were at the time the photograph on Exhibit 3-E was taken?

A. One or two years older.

Q. I show you Plaintiffs' Exhibit 3-D. Do you know when that photograph was taken?

A. No, sir.

Q. Do you know where that photograph was taken?

A. I think it is in front of the public building. I am not sure, sir.

Q. In what city? A. In my village.

Q. Is Exhibit 3-E the first photograph you ever appeared on in your life?

A. The first one, yes.

Q. I show you Plaintiffs' Exhibit 3-C. You identified the person, this person on the left-hand side as—who is that? A. Wong Kwok Foo.

Q. How did you recognize that picture?

A. His face.

Q. That looks like Wong Kwok Foo when you first saw him? [169] A. Yes.

Q. That was in——

A. I don't know, sir.

(Testimony of Wong Kwok Wei.)

Q. When did you testify you first saw Wong Kwok Foo? A. In my village.

Q. When?

A. In the Chinese calendar 38—36.

Q. You could tell that this was Wong Kwok Foo from the picture? A. Yes, his face there.

Q. Now, while your brother, No. 3 brother, Wong Kwok Keung, was going to school in Canton City, how were you and your mother supported?

A. By my father.

Q. Your father would send money to you?

A. Not exactly. Send it to my mother, I think.

Q. Your father sent money to your mother?

A. Yes, I think.

Q. You don't know? A. Yes.

Q. You know that your father sent money to your mother? A. Yes, I know.

Q. You saw some of the money that was sent to your mother? [170]

A. What do you mean sir?

Q. Did you see the letters in which your father sent money to your mother? A. No.

Q. Did your father ever write to you?

A. No.

Q. You never received a letter from your father in your life? A. Never, sir.

Q. Did you ever write your father a letter?

A. Once or twice, yes.

Q. Did you ever receive any letters from any of your brothers in the United States during the

(Testimony of Wong Kwok Wei.)

course of your life? A. Letters? No.

Q. Did you ever write to any of your brothers in the United States while you were in China or in Hong Kong? A. No.

Q. Did you ever have a photograph made with any of your brothers except this photograph that is Exhibit 3-E? A. I don't think so, sir.

Q. Is your No. 1 brother married?

A. Yes, last year, but I think he separated from his wife.

Q. Do you know when your No. 1 brother was married? A. Last year. [171]

Q. Is your No. 2 brother married?

A. No. 2 brother is married Chinese calendar 37. The Interpreter: 1948 or 1949.

Q. (By Mr. Dooley): Do you know when in the Chinese calendar 37 your No. 2 brother married? A. When?

Q. The month and the day?

A. I think it is along in May, something like that, May, June.

Q. Where did your No. 2 brother marry?

A. In Hong Kong.

Q. Is your No. 3 brother married?

A. Yes.

Q. When did your No. 3 brother marry?

A. When? Chinese calendar 32.

The Interpreter: 1943 or 1944.

Q. (By Mr. Dooley): Where did your No. 3 brother marry? A. In my own village.

(Testimony of Wong Kwok Wei.)

Q. Is your No. 4 brother married?

A. Yes.

Q. Where did your No. 4 brother marry?

A. In my own village.

Q. When did he marry?

A. Chinese calendar 36. [172]

Mr. Dooley: What would that be?

The Interpreter: That would be 1947 or 1948.

Q. (By Mr. Dooley): You stated your No. 4 brother and your No. 2 brother came back to the village in CR 37? A. 36, sir.

Q. In 36. Who came back to the village first? Your No. 2 or your No. 4? A. No. 4, sir.

Q. How much later than No. 4 did your No. 2 come back? A. One or two months, sir.

Q. How old were you when your No. 4 brother came back to the village?

A. How old am I? About 14 or 15, something like that.

Q. Is that Chinese calendar or American calendar?

A. I said 14 or 15 years old. You said how old am I? Didn't you ask me that, or what year? You asked me for my age.

The Court: Were you giving your age in the Chinese calendar or the the American?

The Witness: Chinese calendar, sir.

Q. (By Mr. Dooley): During the war did the Japanese come to your village?

(Testimony of Wong Kwok Wei.)

A. You mean in or come to? What do you mean, sir?

Q. Did you see any Japanese soldiers during the war? A. No. [173]

Q. Did you hear about any Japanese soldiers being close to your village during the war?

A. Yes.

Q. Was your No. 3 brother married during the war? A. Yes.

Q. From the time that you first remember until the time that you came to Hong Kong to come to the United States, how many years all together did your No. 3 brother spend away from the village in school? A. Is that away from the village?

Q. Yes.

A. Gee, I can't count it, sir. Sometimes he go to school and at the end of the term he come back home, see. I don't know.

Q. Did you go to school? A. Yes, sir.

Q. While in the village? A. Yes.

Q. Did you go to school inside the village?

A. No, outside the village.

Q. What was the name of the school you attended? A. Chung Hong.

Q. How far was it from Chung Hing Village?

A. From my own village, isn't it?

Q. How far was the school that you attended from [174] Chung Hing Village?

A. Oh, more than two miles, sir, I mean Chinese miles.

(Testimony of Wong Kwok Wei.)

The Court: Chinese miles?

The Witness: Yes.

The Court: How long did it take you to go from your home to the school?

The Witness: Sometimes when—we don't have a watch like today. We never count the time.

The Court: Did you walk?

The Witness: Oh, yes, we walked.

The Court: Two Chinese miles?

The Witness: Yes. More than two Chinese miles.

Q. (By Mr. Dooley): Does your father have any brothers? A. Pardon me?

Q. Does your father, Wong Ho, have any brothers? A. Oh, yes.

Q. How many brothers does he have?

A. Four.

Q. What are their names?

A. What do you mean, sir?

Q. What are the names of your father's brothers? A. Wong Soo. Just one or all of them, sir?

Q. That is the first one? A. Yes.

Q. Now, the second one. [175]

A. The one I named is the second one. Wong Kooie is the big brother. Wong Soo is the second one. Kon, K-o-n, is the third one, and my father is the fourth one.

Q. Have you ever seen Wong Kooie?

A. I have never seen him, no.

Q. Have you ever seen Wong Soo?

A. No.

(Testimony of Wong Kwok Wei.)

Q. Have you ever seen Wong Kon, the third one? A. No.

Q. Now, how many houses were there in the village that you grew up in?

A. Can I have a paper and a pencil?

The Court: Give him a piece of paper and let him draw the village like he did the other one.

The Witness: (Complying.) Around 30, something like that. Around 30.

The Court: How many rows were in the village? Was the village divided into rows?

The Witness: Yes.

The Court: How many rows were there?

The Witness: I think approximately eight or nine.

The Court: Did the village have a head?

The Witness: What do you mean, sir?

The Court: Head of the village.

The Witness: We say the left side is the head of [176] the village.

The Court: The left side?

The Witness: Yes.

The Court: Starting with the head of the village, what row was your family home on?

The Witness: Well, we count the first one is the fourth row. First is only one building that we don't count the building. It is third row.

The Court: What kind of building was that?

The Witness: A house.

The Court: What did they use it for?

(Testimony of Wong Kwok Wei.)

The Witness: For living.

The Court: Do you know who lived in it?

The Witness: Yes.

The Court: Who?

The Witness: Chin Ock.

The Court: Was that at the head of the village?

The Witness: Oh, yes. We say that it the head of the village.

The Court: And there was one house in the first row?

The Witness: Yes.

The Court: And you were in the fourth row?

The Witness: Yes.

The Court: What house in the fourth row were you? [177]

The Witness: What do you mean, what house?

The Court: How many houses were in the fourth row?

The Witness: I think there is five.

The Court: Looking toward the head, was your house one, two, three, four, or five?

The Witness: The last one.

Q. (By Mr. Dooley): In which direction did your village face?

A. I think the west, near the west side.

Q. Now, when was the last time you saw your No. 6 brother?

A. The last time? Chinese calendar 39.

Q. Where was he at that time?

A. In China.

(Testimony of Wong Kwok Wei.)

Q. And where in China?

A. In my village.

Q. How old were you the last time you saw your No. 6 brother? A. 16, I think, 16 or 17.

Q. You testified, I believe, your mother is now in Hong Kong? A. Yes.

Q. When did your mother come to Hong Kong?

A. In Chinese calendar it is 43. [178]

The Interpreter: 1954 to early 1955.

Q. (By Mr. Dooley): Do you know who your No. 6 brother is living with in the village now?

A. Right now?

Q. Yes. A. I don't know, sir.

Q. When is the last time you saw your mother?

A. Chinese calendar 39.

The Court: Where did you see your mother?

The Witness: In my own village, sir.

The Court: She didn't go down to Hong Kong with you when you came to the United States?

The Witness: No.

The Court: Then when you left the village to come to the United States, your mother and your No. 6 brother were in the village?

The Witness: Yes.

The Court: That is the last time you saw them?

The Witness: Yes, sir.

Q. (By Mr. Dooley): Did your No. 2 brother and your No. 4 brother leave the village when they came back in 1947?

Mr. Hertogs: 1949, your Honor.

(Testimony of Wong Kwok Wei.)

Q. (By Mr. Dooley): Your No. 2 and No. 4 brothers came back to the village in 1947?

A. Well, will you say the Chinese calendar, sir?

Q. Did your No. 2 and No. 4 brother come back to the village in CR 36? A. Yes, sir.

Q. When did they leave the village?

The Court: After that date?

Q. (By Mr. Dooley): After that date.

A. You mean leave the village to America? What do you mean by that, sir?

Q. When did they leave the village after that time to come back to the United States?

A. I think they came back, the Chinese calendar 38.

Q. Did they leave the village to go to come back to the United States? A. Yes.

Q. What time of the day?

A. During the morning time, morning, afternoon, something, I don't know.

Q. At the time they left the village to come back to the United States, was your No. 3 brother in the village?

A. Yes. He came with them to Hong Kong, I think. My third brother go with my second and fourth brother to Hong Kong, I think.

Q. Was your No. 6 brother in the village at that time? A. Yes.

Q. Were you attending school at the time that your [180] No. 2 and your No. 4 brother left in 1949 to come back to the United States?

(Testimony of Wong Kwok Wei.)

A. No, sir.

Q. How long did you attend school in the village? A. For seven years.

The Court: The evidence, Mr. Dooley, is that he did not attend school in the village.

Mr. Dooley: I'm sorry.

The Court: The evidence is he attended school outside the village.

Mr. Dooley: That is true.

The Court: So your question assumes something that is not in the record.

Q. (By Mr. Dooley): How long did you attend school outside the village?

A. Seven years.

Q. When did you stop attending school outside the village? A. Chinese calendar 37.

Q. I show you Plaintiffs' Exhibit 8 and refer you to the photograph on this exhibit and ask you, do you know when that photograph was taken?

A. You mean what year?

Q. What year that photograph was taken.

A. I think Chinese calendar 40. [181]

Q. How old were you when the photograph appearing on Exhibit 8 was taken?

A. 16 or 17 years old.

Q. And where was the photograph on Exhibit 8 taken? A. In some kind of——

(Witness addressing interpreter.)

The Interpreter: It is a place where all people obtain their identity cards, took their pictures in Hong Kong.

Mr. Dooley: No further questions.

Your Honor, I have a deposition that was taken pursuant to notice and I would like to offer it in evidence so that the court can examine it.

Mr. Hertogs: I object, your Honor, very definitely, to the deposition going in evidence. This is a deposition taken in Hong Kong, supposed to be a deposition of an expert witness, and I felt that if the government desires to put on testimony of an expert witness, there are plenty of them available right in this locality. In addition and in opposition to the offer, I would direct the court's attention to the fact that counsel stipulated in 1952 as part of the stipulation, as part of the official file in this court, that they could make any examinations they so desired at any time and place and he would voluntarily appear for any examinations that they desired to take. I thought that they would take them, but we can find no record where they [182] have taken them. They have no results available. I feel that if they desire to have them taken, they could have taken them here. They could find plenty of expert witnesses right here in Los Angeles.

In addition to that, there are two or three questions directed to this man as to whether or not he had ever specialized in the subject of radiology, if he had ever taken any courses, and his answers were no.

"You don't regard yourself as a specialist in radiology then?"

"No."

I don't think testimony of that type of witness should be offered.

The Court: Doesn't that go to the weight rather than the admissibility?

Mr. Hertogs: I don't think so, because it goes to the question of an expert witness, depriving the counsel of the right of cross examination.

The Court: Was this taken on notice?

Mr. Hertogs: Yes.

The Court: You could have been there. It might have been expensive, but you could have been there.

Mr. Hertogs: The government has a little more money than my clients have, your Honor. That is very expensive. [183]

If it went to testimony pertaining to relatives, it might be permissible to take the deposition in Hong Kong rather than bring witnesses to the United States, but where you are offering the testimony of an expert witness, and we have plenty of expert witnesses available here, I can't see that the government should take the testimony of a man located 3,000 miles away from here where the case is to be heard.

The Court: You have a chance to have an expert witness to testify, if you wish.

Mr. Dooley, I suppose these are the X-rays upon which the opinion was given?

Mr. Dooley: Yes, your Honor.

The Court: We have the X-rays here then. I don't know whether it is the elbow or the knee joint. We have an X-ray of the elbow and an X-ray

of the knee joint, and an X-ray of the hands.

Mr. Dooley: Yes, your Honor. The doctor from the Public Health Service will be willing to come down this afternoon and put those on if the court wants to look at them.

The Court: I am not an expert. My looking at them wouldn't do any good. I could look at the X-rays by the hundreds and I might not come to the conclusion of what they mean.

Mr. Dooley: He also has a book showing charts up there that he can point out to the court [184] just how the age limits are and how this falls within age limits.

The Court: I think the question goes to the question of the weight of the evidence rather than the admissibility.

Mr. Hertogs: I think it goes to the fact that there is no foundation laid for its admissibility. It is the testimony of an expert witness and no foundation has been laid.

The Court: It is up to me to decide the qualifications, isn't it? The objection is overruled. It may be admitted in evidence.

Mr. Dooley: Thank you, your Honor.

The Clerk: Exhibit C.

(The document referred to was received in evidence and marked as Defendant's Exhibit C.)

Mr. Dooley: That's all I have of this witness.

The Court: You have the cross examination of one more witness, don't you?

Mr. Dooley: I think I have two more, and Mr. Hertogs has another.

Mr. Hertogs: I have one more witness, your Honor.

The Court: You have one more witness?

Mr. Hertogs: Yes. I think Mr. Dooley has the cross examination of Wong Kwok Keung.

The Court: I don't want to keep you down here over the week-end. [185]

Mr. Hertogs: It may be necessary for me to make arrangements to see how fast I can get an expert witness.

The Court: There is a doctor out at the General Hospital who has testified in these cases before.

Mr. Hertogs: Might I have his name?

The Court: You can't get it from me. Mr. Dooley can tell you his name.

Mr. Dooley: I don't have it readily available because I believe it was in Mr. Davis' case. I don't recall his name.

The Court: He has testified in some of these cases. He is not as certain as to age, according to his examination, as these other doctors are. That is, he hasn't been certain so far.

Mr. Hertogs: That is the normal attitude of the expert witness. There is quite a variation. I will be prepared to present an expert witness at the conclusion of this testimony.

The Court: I suppose we better recess until 2:00 o'clock. You might be able to get hold of this doctor during the noon hour.

Mr. Hertogs: I will.

The Court: I can't tell you his name. Maybe Mrs. Smith can tell you. He has appeared in two other cases.

Court will now stand in recess until 2:00 o'clock.

Afternoon Session

The Court: You may proceed.

Mr. Hertogs: As plaintiffs' next witness we would like to call Wong Kwok Hoy.

The Clerk: Do you speak English?

Mr. Wong: Yes.

WONG KWOK HOY

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Wong Kwok Hoy.

Direct Examination

Q. (By Mr. Hertogs): Where do you live, Mr. Wong? A. 206 West 104th.

Q. You will have to talk louder.

A. 206 West 104.

Q. Is that in Los Angeles? A. Yes.

Q. Do you operate a business in Los Angeles?

A. Yes. [187]

Q. Where is that business located?

A. 10420 South Main Street, Los Angeles.

Q. Where were you born, Mr. Wong?

A. In China.

Q. When did you come to the United States?

(Testimony of Wong Kwok Hoy.)

A. In 1933.

Q. At the time of your arrival were you issued a certificate of identity by the Immigration Service?

A. Yes.

Q. Do you have that with you?

A. Yes. (Handing document to Mr. Hertogs.)

Mr. Hertogs: I will ask that the certificate of identity No. 69385 issued by the Immigration Service at Seattle, Washington, on July 20, 1933, be marked Plaintiffs' Exhibit No. 11 for identification.

The Court: It may be marked for identification.

The Clerk: Exhibit 11 for identification.

(The document referred to was marked as Plaintiffs' Exhibit No. 11 for identification.)

Q. (By Mr. Hertogs): I will show you Plaintiffs' Exhibit No. 11 for identification and ask you if you recognize that photograph. A. Yes.

Q. Who is that? A. That is me. [188]

Mr. Hertogs: I will ask it be admitted in evidence, your Honor.

The Court: It may be admitted.

The Clerk: Exhibit 11.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit No. 11.)

Q. (By Mr. Hertogs): What is the name of your father? A. Wong Ho.

Q. Where does your father live at the present time?

A. With my brother at 3424 Edgehill.

Q. Is that Los Angeles?

(Testimony of Wong Kwok Hoy.)

A. Yes, Los Angeles.

Q. Is he the person that was in the court room earlier?

A. Yes, yesterday.

Q. Is he in the witness room right now?

A. No.

Q. I will show you Plaintiffs' Exhibit No. 4 and ask you if you recognize the picture of the person thereon. Do you recognize that picture?

A. Yes.

Q. Who is that? A. My father.

Q. What is the name of your mother?

A. My mother? [189]

Q. Yes. A. Yee Fong Yee.

Q. Where is your mother at the present time?

A. In Hong Kong.

Q. Has she ever been to the United States?

A. No.

Q. How many brothers and sisters do you have?

A. I have got five brothers.

Q. Is that including yourself? A. No.

Q. What is the name of your first brother?

A. Wong Loon Kwong.

Q. How old is he? A. He is 44.

Q. Where does he live at the present time?

A. In Seattle, Washington.

Q. What is the name of your second brother?

A. My second brother is Wong Kwok Keung.

Q. Where is Wong Kwok Keung at the present time?

A. He is right in the witness room.

Q. Where was he born? A. Where?

(Testimony of Wong Kwok Hoy.)

Q. Where. A. In China.

Q. In what village? [190]

A. Chung Hing.

Q. Where were you born?

A. Same place.

Q. What is the date of birth of your third brother, Kwok Keung?

A. Date of birth. I think it is September 3rd. I think.

Q. Is that in Chinese or American?

A. In Chinese.

Q. What year? Do you know the Chinese year?

A. I think it is—let's see. 11th year.

Mr. Hertogs: May we have it in English?

The Interpreter: October 22, 1922.

Q. (By Mr. Hertogs): How much older are you than your third brother?

A. Well, I don't know. Let's see.

Q. Approximately.

A. I think about eight or nine years, something like that.

Q. What is the name of your fourth brother?

A. Wong Kwok Foo.

Q. Where does Wong Kwok Foo live at the present time? A. He live at 3424 Edgehill.

Q. Is that in Los Angeles?

A. Los Angeles. [191]

Q. Where was he born?

A. In China, same place I was.

Q. How old is he? A. He is 34, I think.

Q. Do you know the date of his birth?

(Testimony of Wong Kwok Hoy.)

A. I don't think I remember that.

Q. What is the name of your fifth brother?

A. Kwok Wei.

Q. Where is Kwok Wei at the present time?

A. In the witness room there.

Q. Where was he born?

A. Same, Chung Hing Village.

Q. Do you know the date of his birth?

A. I don't know.

Q. How old is he in years?

A. He is about 22.

Q. What is the name of your sixth brother?

A. Kwok Jin.

Q. Where is he at the present time?

A. He is in China.

Q. Has he ever been to the United States?

A. No.

Q. Were you living in China at the time Kwok Keung was born, your third brother?

A. Yes. [192]

Q. Is the person who is out in the witness room and who is known as Kwok Keung the boy who was born in your home in China?

A. Yes.

Q. I will show you Plaintiff's Exhibit No. 1 and ask you if you recognize the picture of this person.

A. Yes, Kwok Foo.

Q. Who is Kwok Foo?

A. My fourth brother.

Q. I will show you Plaintiffs' No. 3-A and ask you if you can recognize the picture of the person

(Testimony of Wong Kwok Hoy.)

on the reverse side thereof. Do you know that person? A. Yes.

Q. Who is that? A. Kwok Wei.

Q. Who is Kwok Wei? A. My brother.

Q. I will show you Plaintiffs' Exhibit 3-B and ask you if you can recognize the photograph on the reverse side thereof. A. Kwok Keung.

Q. Who is Kwok Keung? A. My brother.

Q. I will show you Plaintiffs' Exhibit No. 5 and ask you if you recognize that photograph. [193]

A. Kwok Keung.

Q. Who is Kwok Keung? A. My brother.

Q. I show you Plaintiffs' Exhibit No. 6 and ask you if you recognize that photograph.

A. Kwok Wei, my brother.

Q. I show you Plaintiffs' Exhibit No. 7 and ask you if you recognize the photograph on page 2 thereof. A. Kwok Keung.

Q. Kwok Keung. I show you No. 8 and ask you if you recognize that photograph.

A. Kwok Wei.

Q. I show you Plaintiffs' Exhibit No. 3-C and ask you if you recognize any of the people there. Do you recognize any of those persons?

A. Yes.

Q. Who are they? Do you know this person on the left-hand side in the white shirt?

A. That is Kwok Foo.

Q. Who is Kwok Foo? A. My brother.

Q. Who is the person in the back, in the middle back here? A. My father.

(Testimony of Wong Kwok Hoy.)

Q. What is his name? [194]

A. Wong Ho.

Q. Who is the person in the front?

A. My mother.

Q. Who is the person on the right-hand side in the white shirt? A. Kwok Keung.

Q. Who is Kwok Keung? A. My brother.

Q. I will show you Plaintiffs' Exhibit No. 3-E and ask you if you have seen that picture before.

A. Yes.

Q. Do you know any of the people?

A. Yes.

Q. You notice I have placed little numbers over these various people in the photograph. We will start with where I call them. Do you know who this is under No. 1? A. Kwok Keung.

Q. Who is under No. 2? A. Kwok Foo.

Q. Who is under No. 3?

A. That is me, Kwok Hoy.

Q. Who is under No. 4?

A. That is my sister-in-law.

Q. Whose wife is that?

A. Kwok Foo's wife. [195]

Q. The little child he is holding, No. 5, who is that? A. That is her boy, her son.

Q. No. 6 over here. A. My sister-in-law.

Q. Who is her husband?

A. Kwok Keung.

Q. No. 7?

A. That is my younger brother.

Q. What is his name? A. Kwok Jin.

(Testimony of Wong Kwok Hoy.)

Q. This person under the No. 8?

A. My mother.

Q. No. 9 is a little child she is holding.

A. That is Sol Bing.

Q. Who is that? A. Kwok Keung's son.

Q. Who is No. 10? A. My wife.

Q. Who is No. 11? A. My son.

Q. Who is this over here, the last one on the right, No. 12? A. Kwok Wei.

Q. I show you Plaintiffs' Exhibit No. 2 for identification [196] and ask you if you can recognize the first photograph contained in that file. Do you know who that is? A. That is Kwok Foo.

Q. I will show you Plaintiffs' Exhibit No. 9 for identification and ask you if you can recognize the first photograph contained in that file.

A. That is me.

Q. I show you Plaintiffs' No. 10 for identification and ask you if you can recognize the first photograph contained in that file.

A. That is my father.

Q. What is his name? A. Wong Ho.

Q. Is your father also the father of the boy who was in the witness room known as Wong Kwok Keung? A. Yes.

Q. Is his mother the same mother as your mother? A. Yes.

Q. Is your father also the father of the boy who was in the witness room known as Wong Kwok Wei? A. Yes.

Q. Is your mother also the mother of that boy?

(Testimony of Wong Kwok Hoy.)

A. Yes.

Mr. Hertogs: I have no further questions of this witness, your Honor. [197]

The Court: Mr. Dooley, do you want to cross examine this witness?

Mr. Dooley: I will cross examine this witness while he is on the stand, your Honor.

The Court: All right.

Cross Examination

Q. (By Mr. Dooley): You weren't in China when Kwok Wei was born, were you, Mr. Wong?

A. No. I was in the United States.

Q. How old was Kwok Wei when you first saw him?

A. Well, when I go back to China in 1947 is the first time I saw him.

Q. How old was Kwok Wei the first time you saw him?

A. I don't know. He is 22 right now. He must have been 12 years old. Right now he is 22. The first time I saw him was 1947.

Q. You got that——

A. I just checked it. The first time I saw him was in 1947 when I went back to China there.

Q. At the time that you first saw Kwok Wei, Kwok Jin was taller than he?

A. Yes, a little bit taller than Kwok Wei.

Q. You say that you figured out he was 12 years old by [198] subtracting——

A. Yes, that is the way I figured it out.

(Testimony of Wong Kwok Hoy.)

Q. How did you figure it out while you were using the pencil there?

A. With my pencil here. At the present time he is 22. I subtract the years passing and then come to 12. That is the way I figure it out.

Q. That was the first time you had ever seen Kwok Wei—I'm sorry. You have already testified to that. A. Yes, that is the first time.

Q. When was the first time you saw the picture of Kwok Wei? A. Kwok Wei?

Q. Yes. A. I never see his picture.

Q. You have never seen a picture of Kwok Wei?

A. No.

Q. While you were in the United States and before you went back to China in 1947, did you receive any letters from Kwok Wei? A. No.

Q. Did you write Kwok Wei any letters?

A. No.

Q. I show you Plaintiffs' Exhibit 3-E and ask you when that photograph was taken? [199]

A. Oh, I think it is 1949, '49, yes. It is a picture taken in 1949.

Q. You are not sure it was taken in 1949?

A. I think it was in 1949, because this picture was taken a couple of months before we left to come back to the United States.

Q. How old was Kwok Wei at the time that picture was taken? A. 15 years old, I think.

Q. I show you Plaintiffs' Exhibit 3-C and ask you if you know when that photograph was taken.

A. This?

(Testimony of Wong Kwok Hoy.)

Q. Yes.

A. I don't know when that was taken. This is the first time I seen it.

Q. I show you Plaintiffs' Exhibit 8 and refer you to the photograph on that exhibit and ask you if you know when that photograph was taken.

A. I don't know.

Q. I show you Plaintiffs' Exhibit 7 and refer you to the photograph on that exhibit and ask you if you know when that photograph was taken.

A. I don't know.

Q. I show you Plaintiffs' Exhibit 3-B and refer you to the photograph on the reverse side and ask you if you know [200] when that photograph was taken.

A. I don't know.

Q. I show you Plaintiffs' Exhibit 3-A and refer you to the photograph on that exhibit and ask you if you know when that was taken.

A. I don't know.

Q. I refer you to Plaintiffs' Exhibit 6 and to the photograph thereon and ask you if you know when that photograph was taken.

A. I don't know.

Q. I refer you to Plaintiffs' Exhibit 5 and to the photograph appearing thereon and ask you if you know when that photograph was taken.

A. I don't know.

Q. I refer you to Plaintiffs' Exhibit 3-D and to the photograph appearing thereon and ask you if you know when that photograph was taken.

A. I don't know when it was taken.

(Testimony of Wong Kwok Hoy.)

Q. When you went back to China in 1947, which of your brothers were in the village at that time?

A. You mean when I first got home?

Q. When you first walked in the village in 1947, name the brothers, your brothers that were in the village.

A. They not home, they go to school when I get home.

Q. None of them were in the village? [201]

A. No, except Kwok Foo. He go down to Chung Hong.

Q. When you walked in the village, the only person in the village was Kwok Foo?

A. He was with me all the way from Chung Hong back to the village. That is a little south, about a mile from the village.

Q. You and Kwok Foo came into the village at the same time? A. Yes.

Q. And when you walked into the village, none of your other brothers were in the village?

A. No, just me and Foo.

Q. What did Foo do then?

A. Well, he was with me all the way from there, come back home all together at the same time.

Q. How long was it after you reached the village before you saw any of your brothers in 1947?

A. Well, I would say afternoon about 4:00, I think about 4:00 or 5:00 o'clock, and then both young brothers, they came back from the school.

Q. What brothers came back from the school about 4:00 or 5:00 o'clock? A. What?

(Testimony of Wong Kwok Hoy.)

Q. Which of your brothers came back from school about 4:00 or 5:00 o'clock. [202]

A. Both came back at the same time.

Q. When you refer to both——

A. Kwok Wei and Kwok Jin.

Q. Kwok Wei? A. Yes.

Q. And Kwok Jin? A. Yes.

Q. What school were they going to?

A. Oh, Chung Hong School.

Q. Where is Chung Hong School located?

A. Well, it is about two miles, I mean Chinese miles, two lis, something like that, from our village.

Q. How long was it after you came back to the village in 1947 that you saw Kwok Keung?

A. You mean when I got home, how long I see him?

Q. How long was it before you saw him?

A. Kwok Keung, he was in Canton attending the university there. I saw him in Kwang Tung before I come home.

Q. You saw him where?

A. In Canton City.

Q. Did you ever see Kwok Keung in the village during your trip to China between 1947 and 1949?

A. You mean all of this time in those years?

Q. Yes. A. Yes. [203]

Q. How long was it after you reached the village in 1947 that you saw your No. 3 brother, Kwok Keung, in the village?

A. I think it was in the summer, the school holiday when they come home.

(Testimony of Wong Kwok Hoy.)

Q. After he came home during summer, did he go back to school?

A. Yes, go back after the summer vacation is over.

Q. On what date was your No. 1 brother born?

A. He was born in 1913. I don't remember the birthday, but in 1913.

Q. Do you remember your birth date?

A. Yes.

Q. What is your birth date?

A. September 9, I mean Chinese date, 1914.

Q. And the CR is 3/9/9? A. Yes, CR.

Q. Do you find your birth date easy to remember with the two nines together?

A. What do you mean?

Q. Do you find your birth date easy to remember with the two nines?

The Court: That is arguing with the witness and asking for a conclusion.

Mr. Dooley: I just asked him for his state of mind, [204] your Honor. I withdraw the question.

Q. Your No. 4 brother, do you remember his birth date?

A. He was born in August. I have forgotten the date.

Q. Is it CR 12-8-8?

A. I think so. It was August. I don't know the date exactly, the day.

Q. Now, you weren't in the village when Wong Kwok Jin was born, were you?

(Testimony of Wong Kwok Hoy.)

A. No. I was in the United States when they were both born.

Q. You weren't in the village when Wong Kwok Wei was born? A. No.

Q. How old was Wong Kwok Foo when you first came to the United States?

A. When I first come to the United States, oh, he was probably around 11 or 12. I don't remember.

Q. How old was Wong Loon Kwong, your No. 1 brother, when you first came to the United States?

A. Let's see. I come to the United States in 1920. He was one year older than me. He must be 21.

Mr. Dooley: No further questions of this witness, your Honor.

Mr. Hertogs: I have one question. [205]

Redirect Examination

Q. (By Mr. Hertogs): At the time you returned home in 1947, Mr. Wong, was this boy who was in the witness room here, and who is known as Wong Kwok Wei, living in the home of your mother? Do you understand the question?

At the time you returned to China in 1947, was Wong Kwok Wei, the boy who was in the witness room, living with your mother?

A. No. They both move out of the house and they go in the little house in the second row there. They moved out before I come home.

Q. Did your mother identify this boy as her child? A. Yes.

(Testimony of Wong Kwok Hoy.)

Q. You will have to speak up. A. Yes.

Q. Did Wong Kwok Wei call your mother mother? A. Yes.

Mr. Hertogs: I haven't any further questions of this witness, your Honor.

Mr. Dooley: I have.

Recross Examination

Q. (By Mr. Dooley): You say both Wong Kwok Wei and Wong Kwok Keung had [206] moved out of the house before you got home in 1947? A. Not Wong Kwok Keung.

Q. Wong Kwok Wei?

A. Wong Kwok Wei.

Q. And Wong Kwok Jin? A. Yes.

Q. Where had they moved to?

A. Well, the next row of houses, the public house there, the second one from the first house—not a house. It is a sort of a public place, you know.

Q. To the public place? A. Yes.

The Interpreter: The school.

The Witness: No, not the school.

Q. (By Mr. Dooley): Not the school?

A. Community house.

Q. They were living in the community house?

A. Yes.

Q. And they slept at the community house?

A. Yes, if that is called a community house. Well, my mother figured out we come back and to make room for us, so my mother fixed the two extra rooms in the hall, in the living room.

(Testimony of Wong Kwok Hoy.)

Q. What is that again?

A. My mother live in one room, and Kwok Keung's wife [207] living in the other room, see.

Q. And Wong Kwok Wei and Wong Kwok Jin lived in the community house? A. Yes.

Q. How far was the community house from your house in the village?

A. Not too far. Just a couple, three doors away.

Q. All while you were in China, Wong Kwok Wei and Wong Kwok Jin——

A. They slept there.

Q. They slept in the community house?

A. Yes.

Q. How many rows were there in Chung Hing Village?

A. How many rows? I think it is nine, about nine.

Q. In what row was your house, Mr. Wong?

A. Fourth row.

Q. In what row was the community house?

A. The second row.

Mr. Dooley: No further questions.

Redirect Examination

Q. (By Mr. Hertogs): Did Wong Kwok Jin and Wong Kwok Wei take their meals in your home? A. Yes. [208]

Q. Did you and your brother Kwok Foo return to China together in 1947? Did you go back to China together?

A. No. We go back at a separate time.

(Testimony of Wong Kwok Hoy.)

Q. Who went first?

A. Kwok Foo went first.

Q. About how long before you went to China?

A. I would say a couple of months, two months.

Mr. Hertogs: I haven't any further questions.

The Court: I have a question or two. Are you the No. 2 brother?

The Witness: Yes, that's right.

The Court: On Exhibit 3-E, where are you?

The Witness: This one here.

The Court: Under figure 3?

The Witness: Yes.

The Court: When was this picture taken?

The Witness: It was 1949.

The Court: Are you sure about that?

The Witness: I think so.

The Court: Well, now, who is the one on the figure 12?

The Witness: Kwok Wei.

The Court: How old was he then?

The Witness: He was 15.

The Court: 15? [209]

The Witness: 15. I think he was 15.

The Court: Did you ever see Exhibit 3-C before?

The Witness: No, I never saw it.

The Court: You never saw it.

Mr. Dooley, have you got some other questions? You said you had some questions.

Mr. Dooley: I have one or two.

(Testimony of Wong Kwok Hoy.)

Recross Examination

Q. (By Mr. Dooley): When you left the village in 1949, did anyone go along with you?

A. You mean on my way back to the United States?

Q. Yes. A. Yes.

Q. Who went with you? A. Kwok Keung.

Q. Did anyone else go with you?

A. My brothers, Kwok Foo, the three of us.

Mr. Dooley: No further questions, your Honor.

Mr. Hertogs: No further questions, your Honor.

The Court: May this witness be excused?

Mr. Dooley: Yes, your Honor.

(Witness excused.) [210]

Mr. Dooley: The doctor is going to look at the X-rays here and he wants to take the X-rays. He said it would be the same as on the other case. He said the same procedure as in the other case.

The Court: All right.

WONG HO

recalled as a witness herein by and on behalf of the plaintiffs, having been previously duly sworn, was examined and testified further, through the interpreter, as follows:

Cross Examination

Q. (By Mr. Dooley): How old are you, Mr. Wong? A. 72.

Q. How old is your wife? A. 63.

Q. What date were you born?

(Testimony of Wong Ho.)

A. KS 11-8-13.

Q. And in what village were you born?

A. San Francisco.

Q. Where was your wife born?

A. In China.

Q. Where in China?

A. Gap Gang Lung Village, Toy Shan, China, Canton.

Q. You first went back to China in 1912, did you not? [211]

A. The first year of the Republic of China, yes, 1912.

Q. I don't believe we got a translation of KS 11-8-15.

The Interpreter: 23rd of September, 1885.

Q. (By Mr. Dooley): When you went back to China in 1912, you were 27 years of age, is that true? A. Chinese 28.

Q. And during your trip to China between 1912 and 1914, your No. 1 son was born, is that true?

A. You mean No. 1 son?

Q. Yes. A. Two were born.

Q. Were you present at the birth of both No. 1 and No. 2?

A. When the first one came, I was at home. When the second one came I was on my way back.

Q. Then you went back to China in 1921, did you not, Mr. Wong? A. Yes.

Q. How old were you at that time?

A. You mean myself?

The Court: Yes.

(Testimony of Wong Ho.)

The Witness: According to the Chinese calendar, the year of CR 1, I was 28 years old.

Q. (By Mr. Dooley): And so in 1921 you were 36 years of age at that time, were you not? [212]

A. You say 1921?

Q. Yes. A. About 37.

Q. According to the Chinese calendar?

A. Yes.

Q. You stayed on that trip to 1923, did you not?

A. Yes.

Q. During that trip your No. 3 and your No. 4 sons were born? A. Yes.

Q. Then you went back to China again in 1934, isn't that true? A. Yes.

Q. At that time you were 50 years of age, is that true? A. About 50 years old.

Q. That is Chinese calendar? A. Yes.

Q. At that time your wife was 45 years of age, was she not?

A. I am about nine years older than my wife.

Q. I am going to call your attention to Plaintiffs' 10-B in evidence, and see if this refreshes your recollection as to how old your wife was when you went back to China in 1934. [213]

"Q. Describe your wife and family.

"A. Yes. She 45 years old, natural feet, living in Chung Hing Village. I have four sons and no daughters: Wong Loon Kwong, 21, in China, never tried to come to the United States, not married, living in Chung Hing Village; Wong Kwok Hoy, 20, not married, attending school in Helena, Mon-

(Testimony of Wong Ho.)

tana; Wong Kwok King, born in 1922, living in my home village. Kwok Foo, born in 1924, living in my home village."

Does that refresh your recollection as to how old your wife was at the time you returned to China in 1934?

A. I don't think this is right, because I know I am about nine years older than my wife. I am nine years older than my wife. When I married her I was supposed to be nine years her senior.

Q. How many brothers do you have, Mr. Wong?

A. Including me, four.

Q. Your No. 1 child, you testified, I believe, was born in Wong Ock Village, is that true?

A. Yes.

Q. The rest of your children were born in Chung Hing Village?

A. The rest of them are all in Chung Hing Village born.

Q. When did you move from Wong Ock Village to Chung [214] Hing Village?

A. After my return to the United States.

Q. How far is Chung Hing Village from Wong Ock Village?

A. I don't know, but according to Chinese li, I suppose it is about 12 Chinese lis.

Q. When you went to China in 1934, you stayed until 1937, is that true? A. Yes.

Q. How old was Kwok Wei when you came back to the United States in 1937?

A. According to Chinese, about three years old.

(Testimony of Wong Ho.)

Q. How old was Kwok Jin when you returned to the United States in 1937?

A. He was born the first month of the year and I left about the middle part of the year.

Q. So he was one year old Chinese?

A. We call him one year old.

Q. After you last saw Kwok Wei at the village when he was three years old in 1937, when was the next time you saw him again?

A. Until he came, when he arrived here.

Q. When did he arrive here?

A. He came 1952, early part of the year. I think I would call him 17 years old.

Q. He was 17 years old when you saw him again? [215] A. Yes.

Q. Have you seen Kwok Jin since you saw him when he was one year old Chinese calendar?

A. No.

Q. How did you recognize Kwok Wei when you saw him in 1952?

A. He came with Kwok Keung together.

Q. And that is the way you recognize him, because he came with Kwok Keung?

A. Kwok Keung said, "This is Wei."

Q. And that is the reason you recognize Kwok Wei? A. Because he looks like him.

Q. You remembered him?

The Court: Mr. Dooley, it's after 3:00 o'clock. I think we better take our recess. This man has already testified how he recognized him. It isn't necessary to go through that any more.

(Testimony of Wong Ho.)

We will now recess until 20 minutes after 3:00.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Dooley): You testified, Mr. Wong, that Kwok Jin is still in the village, is that true?

A. Yes.

Q. And that your wife is in Hong Kong?

A. Yes. [216]

Q. Who is Kwok Jin living with in the village now? A. Himself.

Q. Do you know the reason that your wife came to Hong Kong, leaving Kwok Jin in the village?

A. The communists wouldn't let Jin come out to Hong Kong.

Q. You testified concerning certain letters that constitute Plaintiffs' 3-H-1. The first letter, is that addressed to Kwok Wei?

A. This letter was addressed for my wife. This is the name of the store that relays the letter.

Q. The letter was addressed to Canton, China?

A. For the village.

Q. And the next letter is addressed to Wong Kwok Keung. A. Kwok Keung.

Q. That was addressed to the university in Canton, China? A. That's right.

Q. Do you have any letters, Mr. Wong, that you wrote to Kwok Wei?

A. He is a young boy and whatever I want to tell I tell to the big brother.

Q. Kwok Wei's big brother was in Canton City at the university, was he not? [217]

(Testimony of Wong Ho.)

A. When Wei was studying in school, I either write to the mother or to the elder brother.

Q. I call your attention to Plaintiffs' Exhibit 3-H-2, consisting of various receipts for money sent to Wong Kwok Keung. Do you have any receipts sending money to Wong Kwok Wei?

A. Food and other expenses, the mother take care of, and Wei was a young boy then.

Q. Do you have any receipts sending money to your wife in China?

A. Although the money was sent to Keung to be received, it is understood that the money is to cover the expenses of the home, everything.

Q. How far was Canton City from Chung Hing Village?

A. Far away. I have no definite standard to measure. Of course, according to the way the people generally take it to be, over—it must be over 300 lis, but this is not a standard way of measuring it.

Q. You never sent money to your wife in China, did you?

A. During the wartime, I had sent money home to my wife through a friend during the war years, and in those days you don't get a receipt for the money you sent to your wife directly. The other way was to send it through my boy to take care of for the family.

Q. Is your No. 1 son married? [218]

A. Yes.

Q. Is your No. 2 son married.

A. Yes.

(Testimony of Wong Ho.)

Q. Does your No. 2 son have a daughter by the name of Wong Sell Yee?

A. Kwok Hoy's daughter.

Q. And Wong Sell Yee recently arrived in the United States, did she not? A. Yes.

Q. And applied for a certificate of citizenship?

A. It doesn't matter, soon or later.

Q. And you refused to take a blood test in connection with that certificate of citizenship?

The Interpreter: You mean the grandchild's application?

Mr. Dooley: Yes.

The Witness: No.

Q. (By Mr. Dooley): Isn't it true you were requested to take a blood test in connection with Wong Sell Yee's application and refused?

The Court: Mr. Dooley, this is very interesting, but what does it have to do with this case? We are not interested in the grandchild. Evidently, from what you say, we will be interested a little later on, but what difference does it make? [219]

Q. (By Mr. Dooley): Are you willing, Mr. Wong, to take a blood test in connection with your son Wong Kwok Wei?

A. Why should you take my blood?

Q. What's that?

A. Why should you take my blood?

Q. Don't you feel your blood would be compatible with your son Wong Kwok Wei?

A. My blood?

The Court: Mr. Dooley, does the file show there

(Testimony of Wong Ho.)

has been a blood test taken by this father and his children?

Mr. Dooley: No, it hasn't your Honor.

Q. (By Mr. Dooley): Do you think your blood would match that of Wong Kwok Wei?

The Court: Mr. Dooley, you are getting too far afield. If Mr. Hertogs objected, I would have sustained the objection a long time ago. Now you are asking for a conclusion.

Mr. Dooley: I withdraw the question, your Honor.

No further questions of this witness.

Mr. Hertogs: I haven't any questions, your Honor. Oh, pardon me. I have one.

Redirect Examination

Q. (By Mr. Hertogs): Do you remember testifying at Helena, Montana—— [220]

Mr. Hertogs: I will ask that the statement made by this witness to the Immigration and Naturalization Service at Helena, Montana, October 14, 1921, and contained in Plaintiffs' Exhibit No. 10, be marked 10-D for identification.

The Court: It may be marked.

The Clerk: 10-D for identification.

(The document referred to was marked as Plaintiffs' Exhibit No. 10-D for identification.)

Q. (By Mr. Hertogs): Do you remember testifying at Helena, Montana, in 1921 before you made your second trip to China to the Immigration Service?

A. Yes.

(Testimony of Wong Ho.)

Q. How old were you at the time when you testified in 1921?

A. I was 28, CR 1, and you add nine more years, 37.

Q. Do you remember testifying in 1921 your wife was 27 years of age at that time?

A. That is about right.

Mr. Hertogs: I have no further questions, your Honor.

Mr. Dooley: No further questions.

Mr. Hertogs: I will ask that 10-D be admitted in evidence.

The Court: For what purpose? You have asked the question about the age. [221]

Mr. Hertogs: To clarify the discrepancy occurring on the other Exhibit 10-B, which is in evidence, a difference in age between the witness and his spouse.

The Court: All right. It may be received in evidence.

The Clerk: 10-D.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit 10-D.)

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Dooley: Wong Kwok Keung.

WONG KWOK KEUNG

recalled as a witness by and on behalf of the plaintiffs, having been heretofore duly sworn, was examined and testified further as follows:

Cross Examination

Q. (By Mr. Dooley): Mr. Wong?

A. Yes, sir.

Q. You testified, I believe, that your No. 5 brother was born in 1935, is that right?

A. You mean my fifth brother? My No. 5 brother?

Q. Yes. [222] A. You mean Kwok Wei?

Q. Yes. A. You mean when he was born?

Q. When was he born?

A. CR 24. You want the month and date?

Q. Yes.

A. According to Chinese calendar, March 28.

Q. March 28? A. Yes, Chinese calendar.

Q. You originally testified it was CR 24, March 23. Which is correct? A. 28 is correct.

The Interpreter: April 30, 1935.

Q. (By Mr. Dooley): How long did you remain in the village after Kwok Wei was born?

A. Since CR—I mean since CR 28, I left the village and went to Macao.

Q. CR 28? A. Yes, I went to Macao.

Q. How long did you remain in Macao?

A. Two years.

Q. What were you doing in Macao during those two years? A. I go to school.

Q. You came back to the village——

(Testimony of Wong Kwok Keung.)

Mr. Dooley: Will the interpreter give us the CR 28 [223] for the record?

The Interpreter: 1939 to early 1940.

Q. (By Mr. Dooley): You returned to the village in CR 30?

A. I don't remember exactly. Maybe the last month of CR 30 or the first month of CR 31.

Q. While you were in Macao attending school, did you return home at any time during that two-year period?

A. Only, I think, on the summer holiday when they didn't have school, I mean I went home only in the holiday.

Q. After you came back to the village in CR 30, how long did you remain in the village?

A. Until 33. I'm sorry. I made a mistake. 32.

Q. Where did you go in CR 32?

A. Shiao Kwan, Canton's war capitol.

Q. How long did you remain there?

A. About one year.

Q. When did you return to the village from Shiao Kwan? A. 33

Q. After you returned to the village in 33, how long did you remain in the village?

A. Until 34.

Q. Where did you go in CR 34?

A. After the victory, I went to Canton.

Q. How long did you remain in Canton when you went to [224] Canton in CR 34?

A. In Canton, I went to the Lingnan University. In the holiday, almost every holiday I go home,

(Testimony of Wong Kwok Keung.)

summer holiday and the New Year holiday, I go home.

Q. How long did you attend school in Lingnan University? A. Until 1938.

Q. When your No. 2 and No. 4 brothers came back to China in 1947, you were attending school at a university in Canton, were you not?

A. Right, sir.

Q. Where did you first see your No. 2 and No. 4 brothers in 1947? A. I beg your pardon, sir?

Q. Where were you when you first saw your No. 2 and No. 4 brothers in 1947?

A. I saw No.—let me explain, please. Kwok Foo is coming to Canton first. I saw him in the hotel. I saw my brother Kwok Hoy in a hotel, too, but not at the same time.

Q. Was that the same hotel that you saw Kwok Foo and Kwok Hoy? A. No, sir.

Q. In what city was the hotel in which you saw Kwok Foo in 1947? A. Canton.

Q. In what city was the hotel that you saw Kwok Hoy in [225] 1947?

A. Canton, same city.

Q. After you first saw Kwok Foo in 1947 in the hotel, when was the next time you saw him?

A. Until the New Year's holiday, I go home.

Q. When was that holiday?

A. The same year.

Q. 1947?

A. Yes, 36, right, CR 36. I only remember the CR's.

(Testimony of Wong Kwok Keung.)

Q. After you saw Kwok Hoy in the hotel in Canton City in 1947, when was the next time you saw him?

A. The same time as Kwok Foo.

Q. When you next saw Kwok Foo and Kwok Hoy after the meeting in the hotel and went back to the village, was Kwok Wei living in the family home?

A. Yes, sir.

Q. And was Kwok Jin living in the family home?

A. Pardon, sir?

Q. At that time was Kwok Jin living in the family home?

A. Yes, same place.

Q. Isn't it true that at that time they were living in a community house?

A. What do you mean, community? You mean Kwok Wei and [226] Kwok Jin?

Q. Yes.

A. Yes, sir.

Q. Then they weren't living in the family home at that time?

A. Kwok Hoy, Kwok Foo and my mother, my wife, and my daughter and my son.

Q. Kwok Wei and Kwok Jin were not living in the same home at the time?

A. Not in the home. In the same village.

Q. In the same village?

A. Yes, sir.

Q. When did you go to Hong Kong to come to the United States?

A. You mean when?

Q. Yes.

A. CR 39.

Q. Who went with you?

A. Alone, by myself.

(Testimony of Wong Kwok Keung.)

Q. Did you ever see Kwok Wei in Hong Kong after that time?

A. Yes, he came to Hong Kong about one month later.

Q. How old was Kwok Wei at the time you went to school in Macao?

A. In Macao? Will you give me time? I want to figure [227] out. Five years old.

Q. How old was Kwok Wei when you returned from school in Macao?

A. You mean I return in CR 30 or first month 31? I don't remember exactly. The last month of 30 or the first month of 31. I don't remember exactly when.

Q. How old was Kwok Wei at that time?

A. Seven or eight.

Q. When you commenced school in Bak Chung, how old was Kwok Wei?

A. Eight or nine.

Q. When you started school in Canton, how old was Kwok Wei? A. 10 or 11.

Q. I show you Plaintiffs' Exhibit 3-C and ask you if you know when that photograph was taken.

A. About 23 CR.

The Court: CR 23?

The Witness: Yes.

Mr. Dooley: To save time, I believe the interpreter will state that the difference between CR and English is 11 years, approximately.

Mr. Hertogs: I will agree to that, your Honor.

The Court: All right.

(Testimony of Wong Kwok Keung.)

Q. (By Mr. Dooley): Where was that taken?

A. Canton.

Q. Do you remember what time in CR 23 that was taken?

A. Approximately, but not exactly. I think it is June or July, somewhere like that.

Q. What were you doing in Canton at the time that picture was taken?

A. Just a trip is all.

Q. Exhibit 3-E, when was that taken?

A. When?

Q. Yes. A. 38, CR 38.

Q. How old was Kwok Wei at the time Exhibit 3-E was taken? A. About 15 years old.

Q. Kwok Jin was taller than Kwok Wei at that time, was he not? A. Yes, a little bit taller.

Q. And Kwok Jin and Kwok Wei were sleeping in the community house, were they not?

A. Yes, sir.

The Court: Let me have that a minute. You say this No. 12 is your No. 5 brother?

The Witness: Kwok Wei.

The Court: Who is No. 7?

The Witness: Kwok Jin. [229]

The Court: What is the difference in ages between the two?

The Witness: One years difference.

The Court: Who is the older?

The Witness: Excuse me. Two years difference.

The Court: Who is the older?

The Witness: Kwok Wei is older.

(Testimony of Wong Kwok Keung.)

The Court: He is the smaller?

The Witness: Looks small, yes, but he is older. He looks shorter there than Kwok Jin. He looks small, but he is older.

The Court: And he is two years older?

The Witness: Oh, yes.

The Court: Are you sure of that?

The Witness: Oh, yes, I am sure.

Q. (By Mr. Dooley): I call your attention to Plaintiffs' Exhibit 7 and ask you if you know when the photograph on that exhibit was taken.

A. When?

Q. Yes. A. CR 40, something like that.

The Court: When?

The Witness: CR 40.

Q. (By Mr. Dooley): Where was that photograph taken?

A. This photograph was taken by the organization that [230] belongs to the Hong Kong government, but I didn't remember where.

The Court: Let me see that. This identity is dated August 11, 1951?

The Witness: Yes.

The Court: Was this picture taken about August 11, 1951?

The Witness: Yes.

The Court: About the same time?

The Witness: No, a little bit earlier, because the first time I take this.

The Court: These pictures were taken for this identification card?

(Testimony of Wong Kwok Keung.)

The Witness: That's right, for the identification.

The Court: And that is true with your brother's picture, too?

The Witness: What do you mean, sir?

The Court: The other picture?

The Witness: Yes.

The Court: It was taken about the same time?

The Witness: The same day.

Q. (By Mr. Dooley): How old was your brother Kwok Wei at the time the picture on Exhibit 8 was taken about August 11, 1951? A. 17.

The Court: 17?

The Witness: Yes.

The Court: It says on the picture, identity card, 16.

The Witness: I might have got it wrong. 17 is right.

The Court: Then the card is wrong. The card says 16.

The Witness: You mean the age?

The Court: This card says age 16.

The Witness: According to Chinese custom, when you are born, you get one age. Over here you get two. But the Hong Kong government counts them different.

The Court: Is this American age or Chinese age?

The Witness: I don't know.

The Court: When you say 17, is it Chinese or American age?

The Witness: It is Chinese.

(Testimony of Wong Kwok Keung.)

The Court: 17 in Chinese?

The Witness: Yes.

Q. (By Mr. Dooley): I show you Plaintiffs' Exhibit 6 and ask you if you know when the photograph on that exhibit was taken. A. When?

Q. Yes. [232]

A. I don't remember this one.

The Court: Was that photograph taken before the photograph on Exhibit 8, or do you know?

The Witness: I am not sure, *sure*. I don't know.

The Court: All right.

Q. (By Mr. Dooley): I show you Plaintiffs' Exhibit 5 and ask you if you know when the photograph appearing thereon was taken.

A. This one?

Q. Yes. A. About 38 CR.

The Court: You made your application the same time your brother made an application, didn't you?

The Witness: Yes, that's right.

The Court: You had to have a photograph?

The Witness: Yes, we had a photograph.

The Court: Didn't your brother go with you at the same time to have his photograph taken?

The Witness: No.

The Court: He didn't?

The Witness: No.

The Court: You don't know where your brother got his photograph?

The Witness: I don't remember.

The Court: You don't remember? [233]

The Witness: I don't remember.

(Testimony of Wong Kwok Keung.)

Q. (By Mr. Dooley): I show you Plaintiffs' Exhibit 3-D and ask you if you know when that photograph was taken.

A. This one, that is the time I came home from Canton about 37 or 38.

Q. Where was Kwok Wei at the time this photograph was taken? A. At home.

Q. When is the first time you ever saw a photograph of Kwok Wei?

A. What do you mean, sir?

Q. When is the first time in your life that you saw a photograph of Kwok Wei?

A. Oh, those pictures, the family picture.

The Court: I think it was Exhibit 3-C.

The Witness: The group picture.

Mr. Hertogs: 3-E.

The Court: You've got it there, Mr. Dooley.

The Witness: This one.

The Court: That is the first photograph?

The Witness: Yes, I think so.

Q. (By Mr. Dooley): I show you Plaintiffs' Exhibit 3-A and ask you if you know when the photograph on that exhibit was taken.

A. The same one as this. I don't remember.

The Court: Mr. Dooley, aren't these photographs all the same? I can't see any difference about them.

Mr. Dooley: That does seem to be about the same.

The Witness: This is the same photograph.

Q. (By Mr. Dooley): You stated that was

(Testimony of Wong Kwok Keung.)

taken about CR—— A. CR 38.

Q. During the war did the Japanese come to your village? A. No.

Q. Did you see any Japanese soldiers during the war? A. No, sir.

Q. Did the Japanese come to Canton during the war? A. Yes.

Q. You weren't in Canton at the time the Japanese soldiers were there? A. No.

Q. Did the Japanese soldiers come to Macao during the war? A. No.

Mr. Dooley: No further questions.

Mr. Hertogs: I have no further questions.

The Court: All right. You may step down.

(Witness excused.)

The Court: Mr. Dooley, have you got any other witnesses? [235]

Mr. Dooley: No, your Honor.

The Court: I would like to have the other plaintiff here.

Mr. Hertogs: Well, he is just outside the door, your Honor.

The Court: All right. We can ask him in the morning.

Mr. Dooley: Your Honor, I would like to mention the exhibits, so that the clerk's minutes are correct, they will show that they belong to the defendant, although they are marked plaintiffs' exhibits.

The Clerk: Which exhibits?

Mr. Dooley: The records.

The Court: Mr. Dooley, I am quite sure the clerk marked them exactly as they were offered.

Mr. Dooley: That's true, but in order to get them back.

The Clerk: He is talking about the government records.

Mr. Hertogs: The plaintiffs won't ask for them back.

Mr. Dooley: But the clerk upstairs sometimes raises an objection.

The Court: You want an order to withdraw the documents upon substitution of photostats at the end of the case? [237]

Mr. Dooley: Yes. But if they are marked plaintiffs' exhibits, they are reluctant to hand them over.

Mr. Hertogs: I think we can enter into a stipulation.

Mr. Dooley: If the minutes of the court show they belong to the defendant, then we won't have trouble getting them back.

The Court: All right.

The Clerk: If you have trouble, just ask me.

Mr. Hertogs: At this time, your Honor, I would ask that a stipulation permitting the defendant to make an examination of the plaintiff Wong Kwok Wei in this particular case, which was signed and agreed upon by counsel for the parties in 1952—I can't recall the exact date.

The Court: February 21.

Mr. Hertogs: —be introduced into the record and marked as plaintiffs' exhibit next in order.

Mr. Dooley: I object to that, your Honor, for

this reason. That stipulation was entered into by an Assistant United States Attorney in the Northern District of California some four years ago.

The Court: He represents the government, doesn't he?

Mr. Dooley: Why the examination wasn't taken at that time, I have no way of knowing in any form or fashion. [237] The only thing that the Public Health Service up there reported is that they have no record of the examination or whether one was taken and lost. As an additional reason, I don't think there is any material issue in this case on that.

The Court: Objection overruled. It may be admitted in evidence.

The Clerk: Exhibit 12.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 12.)

The Court: I think it is one of the things to be considered in this case, along with the other testimony.

Mr. Hertogs: I would ask that Plaintiffs' Exhibit No. 2 for identification, which is the official Immigration and Naturalization Service file, be introduced in evidence.

The Court: That is the complete file?

Mr. Hertogs: The complete file.

Mr. Dooley: The defendant objects to the complete file on the ground it is hearsay and will only clutter up the record in case the matter is appealed.

The Court: You know, it seems to me when the

government keeps records on a case, as in this kind of a case, the government shouldn't have any objection to having all their own records go before the court.

Mr. Dooley: We don't particularly have any objection, except that it makes the record cumbersome and it is [238] pretty difficult to find what is in evidence and what isn't. We have a lot of hearsay, admittedly. If, when the government wants to introduce the various records, we were able to do so, I could see it, but it doesn't work both ways.

Mr. Hertogs: There has never been an objection on my part.

The Court: Mr. Dooley, if a rule works one way in this court, it is going to work the other way. The objection is overruled. It may be admitted in evidence.

The Clerk: Exhibit 2.

(The file referred to was received in evidence and marked as Plaintiffs' Exhibit No. 2.)

Mr. Hertogs: We will ask that Plaintiffs' Exhibit No. 9 for identification and Plaintiffs' Exhibit No. 10 for identification, both of which are official files, be admitted in evidence.

The Court: Same objection?

Mr. Dooley: Well, the court probably didn't understand. Ordinarily, we have no objection, but repeatedly before this court we have sought to put the entire files before the court, and we always run into objections from the other side.

The Court: Mr. Dooley, I sustained the objec-

tion because the other side had nothing to do with the preparation of the files, but the government is the one who is preparing [239] those files. They took the testimony.

Mr. Dooley: That is true, but we didn't make the statements given in the files.

The Court: Objection overruled. It may be admitted in evidence.

The Clerk: Exhibits 9 and 10.

(The exhibits referred to were received in evidence and marked as Plaintiffs' Exhibits 9 and 10.)

Mr. Hertogs: We have two other pieces of evidence, your Honor, marked for identification, one of which is the balance of the State Department file, which has not been marked individually, and which is marked as Plaintiffs' Exhibit 3 for identification. Then we have an envelope which was attached to and made a part of Exhibit 3 and which has been 3-H. I ask they both be admitted in evidence.

Mr. Dooley: There is an objection on the ground it is hearsay, irrelevant and immaterial, and has never been admitted when the defendant seeks to offer the contents of the State Department file.

The Court: Objection overruled. It may be received in evidence.

The Clerk: 3-H.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit 3-H.)

Mr. Dooley: Incidentally, in that connection,

the [240] envelope purports to contain certain X-rays that have not been authenticated. In order for the defendant to authenticate them, we had to take a deposition in Hong Kong, and I don't think that the plaintiff should be permitted to get into evidence X-rays that have no authentication. There is no testimony before the court as to who took them, where or how.

The Court: You mean to say there are some X-rays in the file that haven't been presented to the court so far? The only X-rays I know of are these attached to the deposition.

Mr. Dooley: There is an envelope which purports to contain some X-rays taken by a doctor. Who he is or whether he took them, I don't know. Without some authentication, I don't think those should be admitted in evidence.

Mr. Hertogs: They were in the file, the State Department file.

Mr. Dooley: Because they were sent by this doctor to the State Department with a letter.

The Court: Now, Mr. Dooley, we are going to have a doctor here tomorrow. I suppose we are going to have him. This doctor made an examination of the plaintiff and is going to testify. I certainly will pay more attention to this doctor than to some doctor over in Hong Kong.

Mr. Dooley: I think you will find this, your Honor. The reason the defendant, at the time I got the file, didn't seek to have a radiological examination made, from what I have [241] learned from

the experts that I have discussed the matter with, is after a person reaches a certain age, it is much more difficult to ascertain his age with any degree of specificity than it is at an earlier date. Even according to his claimed age now, the plaintiff is from '35 to '57, which would be approximately 22, and even if there were five years difference, the degree of accuracy is not now nearly as close as it was in 1951.

Mr. Hertogs: I would just call your attention to one little point. If you look at the date of the X-ray and the date of the stipulation, you will find there is but a six months variation. There wasn't too much time between the time of the first X-ray and the time of the stipulation and agreement. I don't think that that argument will stand up in the light of the evidence.

The Court: I wonder if we can have the interpreter read what is on the back of this envelope. I can't read it, Mr. Dooley. I want the interpreter to read it for the record.

The Interpreter: The top piece of white paper states, To Hong Kong, Garden Road, 518 number, American Consulate, No. 215, room number, Naturalization Division.

Here are the words under it. Dr. Goh, Hong Kong University, Medical Doctor, England, Wales University, TBMS, the degree equal is—it sounds like Balding TB Hospital, Tuberculosis Hospital, specialist, or special division, [242] London, Oiman Street Hospital, Child Specialist or Special Department.

Then down here is Medical Office, X-ray, Electrical Treatment, Hong Kong, Hennessey Road, No. 267, Second Floor, Phone No. 22275.

The Court: Mr. Dooley, this was found in the government's file, wasn't it?

Mr. Dooley: Yes, your Honor, but now, if I could be assured of the admissibility merely because it is in a government file, then there wouldn't be any necessity for trying to take a deposition, because it is always in the file.

The Court: Is the only thing you are objecting to these X-rays?

Mr. Dooley: I withdraw my objection, your Honor, and allow the X-rays to go in and let the expert tomorrow morning look at the entire file.

The Court: All right. It may go in.

Mr. Hertogs: I would suggest the interpreter put in the record the Chinese characters on this envelope dated June 17, 1946, which is part of Exhibit 3-H-1.

The Court: The Chinese word order is different. They put the word at the end of the name.

Mr. Hertogs: Read the whole translation.

The Interpreter: Hong Kong, Toy Shan, Chew Ging Hai Son, or Market, to be relayed to Wong Kwok Jin's mother, [243] to be received, sent by Wo Hing. That's all the Chinese on this.

Mr. Hertogs: I have nothing else at this time.

The Court: I assume that the witness we are going to have tomorrow is the doctor?

Mr. Hertogs: The court said he wanted the other plaintiff back.

The Court: Yes, I want to ask him one question. You will be ready to proceed with the other case tomorrow?

Mr. Hertogs: Yes, your Honor. What time do you want to start with the other?

The Court: I don't know how long the doctor will take.

Mr. Hertogs: I imagine at least an hour or more.

The Court: Do you want the other case at 2:00 o'clock tomorrow afternoon?

Mr. Hertogs: That is agreeable, your Honor, unless Mr. Dooley feels we may not get through.

The Court: We will get through tomorrow morning. I don't see how you are going to take more than a half day on the doctor.

Mr. Dooley: We will get through tomorrow morning with this case, I am sure. I feel we will, at least.

(An adjournment was taken to 10:00 o'clock a.m., Thursday, January 24, 1957.) [244]

January 24, 1957, 10:00 o'clock, a.m.

The Clerk: No. 20144, Wong Kwok Keung and Wong Ho, as guardian of Wong Kwok Wei, vs. Dulles, further hearing.

Mr. Hertogs: Your Honor, at the time this case was continued last week, we had expected to be able to put on an expert witness this morning concerning the age of this boy. However, I talked to the doctor last night and I have talked to the doctor this morning. It is very definite and clear there will

have to be further tests and examinations made in this case. As a matter of fact, I was told three or four months ago this boy had malaria and that was indicated from the X-rays which were taken. I asked the doctor how long it would take and he said if he went out there today and if they hurried with it they could probably have it ready on Monday, but they can't give us assurance it will be ready on Monday.

The Court: This is your case. It will mean you will have to come back again.

Mr. Hertogs: I realize that, but I am in no position to put on a doctor that is not ready to testify.

The Court: I think the medical testimony in this case may be very important. I don't know whether it will or not. I have a jury case next week. There is some probability that it may not be tried. Even though it is tried, I think I can give you another day next week, but I don't know what [247] day right now.

Mr. Hertogs: Here is the situation, your Honor. I will go and have these tests made as fast as they can be made, and I will stand by, and I am satisfied, if it is agreeable with the doctor, it is agreeable with me, I mean I can switch my calendar around to take care of whatever I have scheduled in San Francisco, and if I have notice of one night, I can be down here and have a session in the morning or the afternoon. All I have is the doctor.

The Court: I can't hear the matter on Monday.

Mr. Hertogs: I know that. I don't think we would be prepared on Monday. I think we would be

gambling if we set it for Monday, because the doctor indicated if everything went along smoothly they might be able to be ready Monday. It is possible they may not, because they may not be able to complete the tests until Tuesday.

The Court: The only thing we can do it wait for the medical reports.

Mr. Hertogs: I would suggest it be continued to some day next week at the court's convenience and preferably in the latter part of the week.

Mr. Dooley: Your Honor, I have a trial before Judge Byrne right now, either Tuesday or Wednesday, that will start. I believe it is Wednesday. If the court can set it up for Tuesday, I believe I could be here. [248]

The Court: We will know later in the day about this jury case.

Mr. Hertogs: We can just pass it temporarily then.

The Court: If this jury case is not going to trial, I can hear you on Tuesday. Even though it is going to trial, I can hear you on Tuesday. I can get my jury and tell them to come back on Wednesday.

Mr. Hertogs: I don't think it is going to take long, probably an hour for the medical testimony.

The Court: You say Tuesday——

Mr. Dooley: I believe it is. Right now the case is scheduled to begin Wednesday before Judge Byrne.

The Court: Suppose we continue the matter until Tuesday then just for the purpose of taking the

medical testimony. No other testimony. If there is any other testimony, I want it today.

Mr. Hertogs: Yes, your Honor.

The Court: All right.

Mr. Hertogs: Your Honor said that you wanted this witness back.

The Court: Let me have one of those exhibits that has the photograph of this witness on it. Any one of them, I don't care which one. [249]

WONG KWOK WEI

recalled as a witness herein, having been heretofore duly sworn, was examined and testified as follows, through the interpreter:

Examination

Q. (By the Court): I want to show you Exhibit 3-A, which is an application for a passport, on the back of which is a picture. That is your picture, isn't it? A. Yes.

Q. When was it taken?

A. When was it taken?

Q. Yes.

A. In Chinese calendar, about 40 or 41, something like that.

Q. You mean CR 41?

A. Yes, CR 41 or 40. I don't remember which year.

Q. This application is dated 5th day of March 1951. This picture was taken before the application was filed?

A. What do you mean by that, your Honor?

(Testimony of Wong Kwok Wei.)

Q. Did you have this picture taken for the purpose of attaching it to the application?

A. Yes.

Q. When you made the application, you had to have a picture, didn't you? [250]

A. Yes.

Q. Did you go out and have this picture taken?

A. Yes, sir.

Q. About what time relative to the application? Just before the application was filed?

A. No, before the application.

Q. How long before?

A. I don't remember, your Honor.

Q. How old were you when this picture was taken?

A. About 16 or 17, sir.

The Court: Let me have the other pictures, will you, please?

The Clerk: Of the other boy?

The Court: No, not the other boy.

Q. (By the Court): I want to show you Exhibit 8. That is your picture, isn't it?

A. Yes.

Q. How old were you when that picture was taken?

A. About 16 or 17.

Q. Then these two pictures were taken at the same time?

A. No, not at the same time. About the same year, I think.

Q. Not the same year?

A. About the same year. The same year. [251]

Q. You were going to school when this picture on Exhibit 8 was taken?

A. Oh, no.

Q. You weren't?

(Testimony of Wong Kwok Wei.)

A. No. It was in Hong Kong for residence.

Q. It says identity card. What was the identity card? What did you have that for?

A. For identification?

Q. Yes. A. Yes.

Q. This is not a school card?

A. No, not a school card.

Q. Which picture was taken first?

A. I think this one is first and then that one.

Q. And that is Exhibit 3-A was taken first. Now, in reference to Exhibit 3-E, the testimony is that the boy—— A. That is me.

Q. The 12 is you? A. That is me.

Q. How old were you then?

A. Oh, let's see. About 14 or 15, something like that.

Q. 14 or 15? A. Yes.

Q. And the boy that is marked 7?

A. That is my small brother. [252]

Q. That is your small brother? A. Yes.

Q. And he was larger than you here?

A. A little bit.

Q. A little bit? A. Yes, a little bit.

Q. Did you ever weigh yourself in China?

A. No.

Q. Then your testimony is that the picture on 3-A was taken one or two years after the picture on 3-E?

A. This one taken before this one. (Indicating.)

Q. Yes, I know, but there is only one two years difference.

(Testimony of Wong Kwok Wei.)

A. I think so, two or three years.

Q. Well, now, you said that the picture on 3-E, at that time you were 14 or 15. A. Yes.

Q. You say the picture on 3-A, you were 16 or 17. A. 16 or 17, about, yes.

Q. Where was the picture on 3-A taken?

A. In Hong Kong.

Q. Where was the picture on 3-E taken?

A. In China.

Q. Whereabouts? A. Where? [253]

Q. Yes. A. In my own village.

Q. In your own village? A. Yes.

Q. Where was the picture taken on Exhibit 8?

A. In Hong Kong.

The Court: I have no other questions. Mr. Dooley, do you want to ask any questions, or Mr. Hertogs?

Mr. Hertogs: I was going to ask a few questions and I think it might clarify the issue.

Redirect Examination

Q. (By Mr. Hertogs): Referring to Exhibit 3-E, was this picture taken in your home village before your brother's return to the United States?

A. Yes.

Mr. Hertogs: I would ask the government to stipulate that the official records of the Immigration and Naturalization Service show that the two witnesses, Wong Kwok Hoy and Wong Kwok Foo, returned to the United States in CR 49.

Mr. Dooley: I don't have the dates. However, the

(Testimony of Wong Kwok Wei.)

records of Foo—no. Incidentally, the Immigration Service doesn't keep records of returns after the war, so I couldn't stipulate to that. [254]

The Court: Isn't the testimony in this case that picture was taken in 1949?

Mr. Hertogs: That is correct.

The Court: That is my recollection.

Mr. Hertogs: I wanted to show it would have to be taken before that date, see?

Q. Now, were you requested by the American Consulate General in Hong Kong to secure pictures at the time prior to your appearance for filing the passport application, which is Exhibit 3-A? Wait a minute. I will rephrase the question.

Did you receive a request from the American Consulate to appear and testify in connection with your passport application?

A. I am not so sure, see, because my brother take care of all those things.

The Court: Did you have that picture taken when your fifth brother took his picture? Did you take your picture together?

The Witness: No.

The Court: Let me have the other application, will you? I want the application for passport.

This is your brother's picture on Exhibit 3-B, isn't it?

The Witness: Yes.

The Court: Your brother testified that he went out [255] and got this picture at the time he filed the application for passport. Did you and he go

(Testimony of Wong Kwok Wei.)

together when he got this picture and you got that picture?

The Witness: You mean go together, or what?

The Court: Have the same photographer?

The Witness: I don't think so.

The Court: You don't think so?

The Witness: No.

The Court: Were you present when he had this picture taken?

The Witness: What I did?

The Court: Were you there when your brother had this picture taken?

The Witness: No, I don't think so.

The Court: Was he with you when you had your picture taken?

The Witness: I think so, he was there. I am not so sure, though.

The Court: You are not sure?

The Witness: I am not sure.

The Court: All right.

Q. (By Mr. Hertogs): Where was this picture taken? A. In Hong Kong.

The Court: "This" doesn't mean anything in the record. That is Exhibit 8. [256]

Mr. Hertogs: Exhibit 8.

The Court: All right.

Q. (By Mr. Hertogs): Where in Hong Kong?

A. You mean where?

Q. Where. A. In Hong Kong.

Q. Where in Hong Kong?

A. You mean what place?

(Testimony of Wong Kwok Wei.)

Q. Yes.

A. In a public building where everybody go to take picture.

Q. Was this card issued to you by the British authorities in Hong Kong? A. I think so.

Q. How long after the picture was taken did you receive this card with the picture attached?

A. I don't remember, sir. My brother take care of that.

Mr. Hertogs: Thank you. No further questions, your Honor.

The Court: Mr. Dooley, do you have any questions?

Mr. Dooley: Yes, your Honor. [257]

Recross Examination

Q. (By Mr. Dooley): This picture you testified was taken just about a short while before your brothers came to the United States, is that right?

The Court: Mr. Dooley, "this picture" doesn't mean anything.

Mr. Dooley: I'm sorry.

The Court: I know what you are talking about, but if you appeal this case, the Circuit won't know what you are talking about.

Mr. Dooley: That is true.

Q. I refer you to Exhibit 3-E and ask you whether the photograph was taken just before your brothers returned to the United States in 1949.

A. Some time after taking the picture, about

(Testimony of Wong Kwok Wei.)

two or three months, and then they come to the United States.

Q. Now, this picture was taken how many months before the application was filed?

A. I don't remember that.

Q. How long after your brothers returned to the United States was it that you went to Kong Kong to come to the United States?

A. About a few months.

Q. About how many months? [258]

A. Oh, let's see. About five or six months.

Q. How soon after that did you go to the American Consulate to try to come to the United States? How soon after you reached Hong Kong did you go to the American Consulate to try to come to the United States?

A. Almost a year, sir.

Mr. Dooley: I have no further questions, your Honor.

Mr. Hertogs: No further questions, your Honor.

The Court: Well, this case will be continued to next Tuesday morning at 10:00 o'clock.

Mr. Hertogs: Thank you, your Honor.

The Court: If at that time the doctor is not ready to testify——

Mr. Hertogs: I will let the court know on Monday for sure.

The Court: Then you may not have to make the trip.

Mr. Hertogs: I will definitely let the court know.

The Court: All right. Then we will be ready to

proceed on the other case at 2:00 o'clock this afternoon. [259]

February 12, 1957, 10:00 O'Clock A.M.

The Clerk: No. 20144, Wong Kwok Keung et al., vs. John Foster Dulles, further trial.

Mr. Hertogs: Ready, your Honor.

Mr. Dooley: Ready.

The Court: The only purpose of this hearing was to hear the medical testimony. Have you got your doctor here?

Mr. Hertogs: Yes, I have, your Honor.

The Court: We will call the other case.

(Other court matters were taken up.)

The Court: All right, Mr. Hertogs, you may proceed.

Mr. Hertogs: Before I call my witness, I would like to renew the motion with regard to the deposition in Hong Kong. At this time I would move that the deposition introduced as Exhibit No. C be stricken from the record on the ground that such exhibit fails to show that the person who testified in Hong Kong meets the qualifications of an expert witness, and also it deprives the plaintiff of the right of cross examination, because under Rule 26 it is essential for cross examination to be permitted unless it can be established that the deposition should not be admitted in a case of this nature unless witnesses are unavailable. [261]

I want to call your attention to this one case, a decision by Judge Mathes of this court, in which

he commented upon an administrative procedure, 121 Fed. Supp. 463.

The Court: Wait a minute.

Mr. Hertogs: That is 121 Fed. Supp. 463, starting at page 475.

The Court: I will read the case. The motion is denied.

We have got the doctor here and I want to hear what he is going to say.

Mr. Hertogs: I have the doctor here. Dr. Jacobson, will you take the stand, please?

GEORGE JACOBSON

called as a witness herein by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: George Jacobson.

The Clerk: How do you spell your last name?

The Witness: J-a-c-o-b-s-o-n.

Direct Examination

Q. (By Mr. Hertogs): Where do you live?

A. 2313 Moreno Drive, L. A. 39. [262]

Q. What is your profession?

A. Physician.

Q. Are you licensed to practice in the State of California? A. Yes, I am.

Q. Would you explain briefly for the court your background?

A. I am a radiologist. I am chief radiologist of the Los Angeles County Hospital, and professor

(Testimony of George Jacobson.)

and head of the department of radiology at the University of Southern California.

Q. What education have you had with regard to radiology, Doctor?

A. I had a three-year residency at the Los Angeles County Hospital, following a two-year internship, and I have been in the practice of radiology, counting the residency, since 1939.

Q. Do you belong to any organizations or societies specializing in radiology?

A. Yes. I belong to the two local societies, the L. A. Radiology Society and the Radiology Society of Southern California, the American College of Radiology, Radiology Society of North America.

Q. Doctor, in connection with your radiological [263] studies, have you had any past experience concerning the bone age of individuals?

A. Yes, I have.

Q. As a matter of fact, you have previously testified as an expert witness before this court?

A. Yes, I have.

Mr. Hertogs: May we have the shadow box put up here, your Honor?

The Court: Yes, the bailiff will put it up for you.

Mr. Hertogs: Before we start, your Honor, may we have the lower X-ray here marked as Plaintiffs' exhibit next in order for identification?

The Court: It may be marked.

The Clerk: 13 for identification.

(Testimony of George Jacobson.)

(The exhibit referred to was marked as Plaintiffs' Exhibit No. 13 for identification.)

Q. (By Mr. Hertogs): Doctor, I call your attention to——

Mr. Dooley: Your Honor, may I interpose an objection to the exhibit and to questioning on the exhibit 13 because it hasn't been authenticated as when and where it was taken. It doesn't appear that that this doctor took that particular X-ray.

The foundation for the taking of the X-ray——

The Court: May I inquire, where was the X-ray found? [264]

Mr. Hertogs: He will have to testify with regard to that, your Honor. I personally took the plaintiff in this action to the X-ray laboratory of Dr. Maurice Robinson in the City and County of San Francisco on the date indicated on the X-ray plate, which is January 31, 1952, and that X-ray, your Honor, has been in my possession ever since that date.

Mr. Dooley: I don't question Mr. Hertogs' statement, but then as to the foundation of who took the X-ray and the conditions——

The Court: Mr. Dooley, you know, theoretically, I think I would be justified in granting Mr. Hertogs' motion to strike your deposition and the doctor's testimony that you introduced relative to the X-rays and the opinions given concerning the age of this applicant. I didn't do that.

Now you are coming in and raising a very technical objection. I will be very frank to say if I

(Testimony of George Jacobson.)

sustain the objection I will then reconsider and grant Mr. Hertogs' motion to strike the deposition and the exhibits and the opinions thereon, and if we do that, then we have no testimony at all.

Mr. Dooley: I think, your Honor, that although the objection might be technical, generally when an X-ray is introduced, you produce the person who made the X-ray.

The Court: Not only that, but as a general rule, as Mr. Hertogs stated, he should have had the opportunity to cross examine the doctor over in [265] Hong Kong and find out when the X-rays were taken, how they were taken, and also the qualifications of the doctor. I think you are skating on rather thin ice.

The objection is overruled.

Q. (By Mr. Hertogs): Doctor, referring first to the upper X-ray, which is the X-ray attached to the deposition, which is Exhibit C in this case, you notice the picture at the top. Can you tell us from your past experience the approximate age of the person whose X-ray was taken at that time?

A. Referring to the textbook which is in standard use in this country, the Radiographic Atlas of Skeletal Development of Hand and Wrist by Grulich and Pyle, that would be, as we looked this over just a few moments ago, according to these standards, that would place it, oh, somewhere between 10 and 11 years of age.

Q. At that time?

A. At that time.

The Court: What is the number of that exhibit?

(Testimony of George Jacobson.)

Mr. Hertogs: This is C, your Honor.

The Court: Exhibit C.

Q. (By Mr. Hertogs): Now, referring to the——

The Court: Just a minute. When was this X-ray taken?

Mr. Hertogs: That was taken March 14, 1951.

The Court: All right. [266]

Q. (By Mr. Hertogs): Now, referring to Plaintiffs' Exhibit 13, at the bottom here, which also has an X-ray of the hand, can you tell us the approximate age at that time?

A. It would have to be, according to these standards, approximately it corresponds most closely to the standard given for 12 years and 6 months.

The Court: When did you say that was taken?

Mr. Hertogs: January 31, 1952.

Q. In other words, Doctor, between March of 1951 and January of 1952, there is a larger variation in the bone development than there is in the chronological time? A. Somewhat.

Q. Doctor, do you have an X-ray of one Wong Wei which was taken here recently? A. Yes.

The Court: It may be marked Plaintiffs' Exhibit No. 14.

The Clerk: Exhibit 14 for identification.

(The exhibit referred to was marked as Plaintiffs' Exhibit 14 for identification.)

Q. (By Mr. Hertogs): Doctor, was this X-ray taken at your request and under your direction?

A. Yes, it was.

Mr. Hertogs: May I put this on here? [267]

(Testimony of George Jacobson.)

The Court: Yes.

Q. (By Mr. Hertogs): This X-ray, I believe, was taken January 23, 1957. A. Yes, it was.

Q. From the X-ray of January 1957, can you tell us the approximate bone age of the person concerned?

A. This is where we get into a somewhat more difficult period, because at this stage this boy's epiphysis, that is, the growing ends of his long bones, have almost all united excepting possibly the distal ends of the radius which, too, is almost completely united, although still slightly open, so at this stage we get into a rather indefinite period where this boy—for instance, if you look at the standards here, he could be 17, 18, or he could be 25, as a matter of fact. If you get into the stage of development where the epiphysial closure is very irregular, that could be.

The Court: From the X-ray, you wouldn't be able to estimate the age of the boy in January 1957?

The Witness: No, sir.

The Court: You would say anywhere from 17 to 25 years?

The Witness: Yes. I mean this is a very indefinite period. As a matter of fact, the standard books don't go beyond the age of 18.

Q. (By Mr. Hertogs): According to the last [268] X-ray, the boy could be 21 on January 1957?

A. Yes.

Q. From looking at those X-rays, Doctor, is it your opinion that there was an acceleration be-

(Testimony of George Jacobson.)

tween the time of the taking of the first X-ray in March 1951 and the time of the taking of the last X-ray in January 1957, giving consideration, also, to the X-ray taken in January 1952?

A. Well, let me answer the question this way. Supposing this boy corresponds to his age on the film as we have it here, both in Hong Kong and in this one taken in San Francisco, let's take the one in San Francisco, which is exactly five years ago. If he is 12 years old then, he could be 17 years now without any difficulty, according to these films, I mean this could represent the bones of a 17 year old boy at present, so that then there would be no discrepancy.

On the other hand, this could also represent the bones of a boy of 21 now, so that if that were true, then there would be a discrepancy. In other words, he could have accelerated growth between the films of 1952 and the films of today. Now, this something, of course, I would have no way to judge. Now, if you would——

Q. Looking at the film of March 1951 and the film of January 1952, you stated the film of March 1951 indicated a bone age of—was it 10?

A. 10 years, roughly. [269]

Q. 10 years, and the other one indicated about 12 years and six months?

A. We said it was between 10 and 11 years of age.

The Court: That is in 1951?

The Witness: Yes, sir.

(Testimony of George Jacobson.)

Q. (By Mr. Hertogs): In March 1951?

A. Yes.

The Court: And in 1952 you said 12½.

Q. (By Mr. Hertogs): So in the nine months period, it shows a definite acceleration?

A. Acceleration of growth more than one would usually expect.

Q. Now, Doctor, is it normal, to have an acceleration when there is a change of environment?

A. One can.

Q. And nutrition? A. Yes.

Q. As a matter of fact, nutrition and environment have considerable to do with the development of the bones, isn't that correct?

A. In that the nutrition and environment influence the hormonal status of an individual.

Q. If a person changed locality of residence, say from the interior of China to Hong Kong, and then subsequently to the United States, could that fact and the change of environment and [270] probably nutrition and better food, cause an acceleration in the growth? A. It could.

Q. And it is possible that maybe malnutrition actually caused a retardation of the bone development? A. That is a possibility.

Q. From the X-rays of January 1957, Doctor, would you state that it would be possible for that boy to be 21 years of age at that time?

A. That is within the realm of possibility, yes.
Mr. Hertogs: I have no further questions.

(Testimony of George Jacobson.)

The Court: I would like to ask the doctor a question or two.

Mr. Hertogs: Yes.

The Court: Doctor, is it possible to determine the age of a youngster accurately by a study of the bones?

The Witness: Your Honor, it depends upon your definition of accuracy.

The Court: All right. Supposing we have a youngster who is nine or ten years of age. Will a study of the bones determine that accurately, or is it more or less a hypothetical age?

The Witness: No. If one assumes that the boy, let us take the age of 10, if one assumes that the boy or the girl is normal, then one should expect [271] the bone age, as given in these standards to correspond fairly closely, and again that is rather an indefinite term, but let us say if the child were 10 and the bone age were seven, you would say that child was probably not normal.

On the other hand, if the child were 10 and the bone age were that of a 13 year old, you would say that is abnormal.

On the other hand, if the bone age corresponded to the standards between 11 and 12, you would say that is within normal variation, just as though physically you looked at a child and somebody told you this was a child of 10 and he looked 14, you would say there is something wrong with the boy, or if he looked six, you would say there is something wrong.

(Testimony of George Jacobson.)

But our experience in just looking at people tells us there is some variation in normal which we have by our experience learned to allow for. That is pretty much the same thing with bone age. It does reflect the physiologic status of the individual within a fair degree of accuracy, so that we have learned to rely on them, and particularly where we have consecutive films, such as we have here. That is even a more important aspect of this, is to have film from one age, and then have them several years later. It gives us a much closer tolerance.

The Court: Can you estimate the age of a boy [272] by looking at him, by visual observation?

The Witness: I am probably no better at it, sir, than most other people, but we all learn to do that more or less, by looking at individuals as we walk down the street. Even from the rear, we learn to estimate the age fairly well.

The Court: Assuming that a qualified radiologist examined this boy in 1951, took X-rays, examined the bone structures, and came to the conclusion he was nine or ten years of age, according to the bone structures, would you say that would be an accurate way to estimate his age?

The Witness: That would be a fairly accurate way, sir, to estimate the physiologic age.

The Court: Then his real age, that is, his calendar age, and his physiologic age, wouldn't be the same?

The Witness: In the normal individual who has undergone normal growth, normal maturation, they

(Testimony of George Jacobson.)

correspond fairly close. When there are abnormalities, then you get into complications and there are many, many things which influence bone age.

The Court: The only abnormality we would have in this case, as far as I know, is the fact that this boy lived in the interior of China, he was there during the war, there was a shortage, probably, of food. Now, if I remember the testimony in this case, that was the only thing that could be, the only explanation you would have as to why [273] the boy wouldn't have grown properly.

Would the lack of food, lack of nutrition, have any effect whatsoever upon the development of the bones?

The Witness: Oh, yes, sir. That is a strong factor, sir. For instance, if one examines first and second generation people in this country, as they come across from Europe, from Central Europe particularly, the first generation is rather small, and the second generation is usually an inch or two inches taller.

That is, to the best of my opinion and people I have talked to, largely a matter of environment and nutrition, not heredity obviously. So that nutrition is a very important factor in the size and growth of an individual and in his maturation.

The Court: Mr. Hertogs, you don't know of any diseases that this boy had in the record, do you? That is, the record doesn't indicate any diseases of any kind?

Mr. Hertogs: No. I might tell the court we have

(Testimony of George Jacobson.)

had tests made of this boy of every possible known test. However, such tests would only show what was present at this date. Those tests are all negative. The only thing that developed was that the boy did have malaria from the age of 3 until the time he went to Hong Kong. Outside of that, he said he lived a normal life.

The Court: Would malaria have anything to do [274] with the development of the bones, Doctor?

The Witness: I am frank to say, sir, I don't know. I would imagine if a person had malaria of any severity, he would be quite sick and, being sick, his physiologic state would be lowered, and from that standpoint I could imagine it, but I have no knowledge of any direct relationship.

I think there is evidence here that there is—the difference between this first set of films taken in Hong Kong and the one taken by Dr. Robinson in San Francisco would to me be a little on the unusual side in that there is some acceleration of growth here, and that is maintained on the last set of films.

The Court: Well, considering the X-rays that were taken in Hong Kong, would you put that on the shadow box first?

(Witness complying.)

The Court: In the examination of those X-rays, would you have come to the conclusion that the boy was nine or 10 years of age?

The Witness: I would have, according to these standards that we have here, your Honor, I would

(Testimony of George Jacobson.)

have placed him somewhere between the ages of 10 and 11, which is not too far off from nine and 10. I would say according to these pictures here, he is probably closer, he fits closest to the 10 year standard and possibly between the 10 and 11. He doesn't fit very well the nine year standard at all. [275]

The Court: When you were here on another case, I asked you about the accuracy of your determination as to the age, and you told me that, if I remember correctly, that it was impossible to pinpoint the age, and all you could do was give a minimum and a maximum.

The Witness: Yes, sir. At the age of 10, one has a variation, maximum variation, of two years, that we accept as a normal variant.

The Court: All right. Supposing the boy is 10. Then the boys would show he was either eight years of age or 12 years of age.

The Witness: Yes.

The Court: So you have got a spread there of four years.

The Witness: Yes, sir, two years on each side of zero.

The Court: What is the age you claim this boy was at the time the X-rays were taken?

Mr. Hertogs: He was 15 something at the time this first X-ray was taken.

The Court: All right. That's all I wanted to know.

Doctor, would you tell me that those X-rays could indicate a 15 year old boy?

(Testimony of George Jacobson.)

The Witness: I would say this, sir. If this boy [276] is stated to me to be 15, then I would say these X-rays are definitely abnormal.

The Court: In other words, if the boy was 15 at the time the X-rays were taken, then the X-rays are abnormal?

The Witness: Yes.

The Court: Because the X-rays won't show a boy of 15?

The Witness: That is correct. They are definitely abnormal then. According to our standards, they could not correspond to a normal boy at the age of 15.

The Court: You are positive of that, are you?

The Witness: Well, sir——

The Court: That is, as far as any doctor can be positive?

The Witness: Yes, sir. I would say unequivocally in my experience these do not correspond to the age of a normal boy of 15.

The Court: Would they correspond if this so-called normal boy had had a period of malnutrition?

The Witness: Well, of course that—I have seen X-rays, sir, of children of 12 and 15 with a bone age of 3 and 4. I have seen as much as a 10-year variation with certain illnesses. I have not had a vast experience, living in this country, I have not had a vast experience with malnutrition. Fortunately, we don't run into very many instances of [277] malnourished children. Occasionally we do

(Testimony of George Jacobson.)

see one that is brought into the hospital where there has been a family circumstance, as you have undoubtedly seen, of much malnourished children, and those children will have retarded bone age.

The Court: All right. Mr. Dooley?

Mr. Dooley: I only have one or two questions.

Cross Examination

Q. (By Mr. Dooley): Doctor, in the case of malnutrition, where two persons, two children, say, growing up in the same family eat the same food throughout their lives, is it likely that malnutrition will affect both of the children equally? What is the situation in that regard?

A. That is a very difficult question, Mr. Dooley, because what you are asking me, if I understand your question correctly, is, given a substandard diet for two individuals who are very closely related, so that you would expect their reaction would be much the same, would those two individuals react the same. That is a very difficult question to answer. It is almost impossible to answer that question. One would normally expect that two individuals, again with certain limits, would react fairly much the same to a substandard diet but, of course, as you know, some people have more resistance to change than others, so that is why your question is difficult. [278]

Mr. Dooley: No further questions.

Mr. Hertogs: I want to ask the doctor one further question.

(Testimony of George Jacobson.)

Redirect Examination

Q. (By Mr. Hertogs): Referring to the X-ray of January 31, 1952, along the same line of examination by Judge Westover, is that picture closer to the normal age if that boy was over 16 at that time?

A. If you tell me this boy is—how old is he now?

Q. At that time he would be 16½.

A. I would say that is still abnormal.

Q. That is still abnormal? A. Yes.

Q. But that is closer to the normal age than the picture reflected by the March 1951 X-ray?

A. Slightly, not much more than slightly. If you tell me this boy is 16½ and his bone age corresponds to roughly 12½, or the absolute maximum on this film here of 13 years and 3 months, but more closely to that of 12 years and 6 months, there is a four-year discrepancy, which is somewhat beyond normal expectation.

Q. However, it is not beyond the possibility, [279] given an abnormal condition?

A. An abnormal condition, you see, these standards are set up for normal, and given an abnormal condition, almost anything can happen.

Mr. Hertogs: I have no further questions, your Honor.

Mr. Dooley: I have no further questions.

The Court: May the doctor be excused?

Mr. Dooley: The doctor may be excused as far as I am concerned.

The Court: Doctor, you may be excused.

The Witness: Thank you, sir.

(Witness excused.)

The Court: Before we proceed, I think I will take the afternoon recess while I read this case of Judge Mathes, so we will recess until 11:00 o'clock.

(Recess.)

Mr. Hertogs: At this time, your Honor, I would ask that the last two exhibits marked Plaintiffs' exhibits for identification be received in evidence.

The Court: They may be received in evidence.

The Clerk: 13 and 14.

(The exhibits referred to were received in evidence and marked as Plaintiffs' Exhibits 13 and 14.)

The Court: Now, Mr. Hertogs, for the purpose [280] of the record I am going to allow you to renew the motion you made previously, and particularly the one you made at the beginning of the hearing today relative to the deposition that was filed and received in evidence in this case.

Mr. Hertogs: At this time, your Honor, the plaintiff moves that the Exhibit C, which is the deposition taken in Hong Kong, be stricken from the record on the grounds that no foundation has been laid for its admissibility, that the deposition itself shows that the person who testified in Hong Kong admitted he had had no experience or no training as a radiologist; that the plaintiff was denied the right of cross examination of the person who gave that deposition, even though proper notice was served upon counsel, inasmuch as the party who was then testifying was in Hong Kong, and

the plaintiff was unable to bear the expenses of paying the transportation of counsel to Hong Kong and back, and it was inconvenient for counsel likewise to appear in Hong Kong for that purpose.

And on the further ground that it would have been possible for the government to find an expert witness within this locality and within the jurisdiction of the court, who could testify in this matter inasmuch as the deposition related solely to the testimony of an expert witness, and not to a single witness who would ordinarily testify in another type of civil proceeding.

In this particular case, it is not a question of one [281] person who has knowledge concerning the subject matter, but is one which there are numerous experts available in this locality to testify on.

The Court: Now, Mr. Hertogs, I notice there was a notice of taking deposition on oral examination, and this notice was directed to the plaintiffs and to Jackson and Hertogs, their attorneys. The notice says the deposition would be taken in Hong Kong on November 5, 1956, at 10:00 o'clock in the forenoon before the Vice Consul of the United States.

Do you find any fault with the notice?

Mr. Hertogs: None whatsoever, your Honor, because counsel made no objection to the fact that it was being taken before the Consul, which is actually associated with the defendant.

The Court: If you had notice, the plaintiff could have obtained someone to represent him at that hearing, could he not?

Mr. Hertogs: That is correct.

The Court: And in the light of what has recently happened in San Francisco, you possibly might have got an order from the court to allow you to go to Hong Kong as an officer of the court for the taking of the deposition. I don't know whether you could or not, but you might have.

Mr. Hertogs: At that time I didn't think it [282] appropriate to ask the court to pay my expenses.

The Court: Well, now, the notice was given and the deposition was taken at the time and place of the notice, is that correct?

Mr. Hertogs: I believe so, your Honor. I have no objection to the notice whatsoever.

The Court: Then the doctor appeared under the deposition for the purpose of giving testimony.

Mr. Hertogs: That is correct.

The Court: You have no fault with the way the questions were put to the doctor?

Mr. Hertogs: None whatsoever.

The Court: Your only objection is to the qualifications of the doctor, is that correct?

Mr. Hertogs: I think on the face of the deposition it shows the doctor did not have the qualifications of an expert witness.

The Court: I might not have been willing to have taken the testimony of this doctor standing alone, but in the light of the testimony of Dr. Jacobson, who says that, assuming that the doctor was qualified, he came to the right conclusion, how

can I then rule he wasn't qualified? He came to the right conclusion from the X-rays themselves.

Mr. Hertogs: Counsel, of course, is put in a rather embarrassing position by the admission of [283] that evidence, your Honor, because by the admission of the deposition, then counsel is called upon to offer expert testimony of Dr. Jacobson this morning. However, if the deposition had not been admissible——

The Court: Mr. Hertogs, I wanted Dr. Jacobson here because I was rather of the opinion he was going to help your case. I felt his testimony would raise such a question in my mind, that it would be a matter of taking the opinion of one expert against another expert, but when your doctor comes in and verifies the finding of the first expert, then there is no difference of opinion.

Mr. Hertogs: There is a difference of opinion, very definitely, between the testimony of the expert in Hong Kong and the testimony of Dr. Jacobson this morning.

The Court: What is the difference in opinion?

Mr. Hertogs: In the first place, the one in Hong Kong is based upon the one X-ray taken on March 19, 1951, in which he finds nine or ten years of age, and Dr. Jacobson testified this morning from the charts of a normal individual it would be ten or eleven, which is not much different. However, comparing that to the X-ray taken in January 1952, there he puts it between 12-6 and the last one could be even 13-3.

The Court: I know, but the doctor says that

assuming that the boy was normal when the X-rays were taken in Hong Kong, he could find no fault with the conclusions of the doctor. [284]

Mr. Hertogs: That is correct.

The Court: Now, we don't have anything in the record to show any abnormality with the possible exception of malnutrition.

Mr. Hertogs: That is correct, and which he says is a very deciding factor.

The Court: But what evidence is there in the record about malnutrition? We know that the Japanese came in and the people ran to the hills and there was probably a shortage of food. We know that. We can probably take judicial knowledge of the fact that when a conquering army comes in, the resident populace probably has less food than under normal conditions, but that doesn't in itself establish malnutrition, does it? It is just possible the mother gave all the food to the children. It has been done. It is an argument, but I don't think there is any evidence to sustain it.

Mr. Hertogs: Outside of judicial notice, I don't know how it could be proven today. We have unfortunate conditions existing which make it impossible.

The person who would be the best witness is the mother and the mother is not available.

The Court: That is true. That is perfectly true.

The doctor testified that this was taken in his office March 14, 1951, and after that he made a radiological examination for the purpose of [285] estimating the age. After making this examination,

he came to the conclusion that the boy was nine or ten years of age. I don't know how, in the light of the evidence in this case, I can disregard that finding. If the finding is true, if that is the proper age of the boy, then the government should have a judgment.

Mr. Hertogs: If that was the right chronological age, yes.

The Court: If that is the right chronological age.

Mr. Hertogs: I would agree if that were the right chronological age. There would be no question about it. But that is only a physiological age as determined by the bone development as shown in that one X-ray picture at that time, but, however, over the next nine-month period you have a very definite acceleration, he says slight, but he put it at 10 or 11, and 9 months later it is 12 years and 6 months, and at the last he says it could even be 13-3, but taking the lower figure, taking the upper figure of the first one, which would be 11, and taking the lower figure of the next X-ray, which is 12-6, there you have a year and a half growth of bone development in a nine-month period. That is taking the minimum. That shows a very definite increase in the development after the boy reached Hong Kong, with a change in environment and nutrition.

Then you have got the same thing, taking the difference between 1952 and the one now. You have [286] got a very definite increase. Taking the top bracket, either one, or taking the lower bracket,

you have got more than a five-year variation. It is only five years chronologically.

I think the court agrees that the doctor has testified, and if you take the one in there, it is more definite, but this Dr. Jacobson has testified that Exhibit C, which is the one of March 1951, shows 10 or 11 years of age, and he has testified the one in January 1952 shows 12 years and 6 months, or even possibly 13 years and three months. Now, the chronological period between the time of taking those two X-rays was nine months. However, the difference between the bone development in that same period of time is certainly more than 18 months.

The Court: When was the plaintiff born in this case?

Mr. Hertogs: 1935, your Honor.

The Court: That is the American age?

Mr. Hertogs: No, 1936. Mr. Dooley has it there.

Mr. Dooley: April 30, 1935.

The Court: American?

Mr. Hertogs: Yes.

Mr. Dooley: Yes, your Honor.

The Court: If the plaintiff was born in 1935, and Exhibit 13 was taken in January 1952, there is a difference of 17 years. According to the doctor, [287] the plaintiff was $12\frac{1}{2}$ years of age at that time.

Mr. Hertogs: He said $12\frac{1}{2}$ to 13-3.

The Court: Well, take 13.

Mr. Hertogs: He would be 16-9. That is three years and six months difference.

The Court: It is true he said there was a spread here of four years, that is, two years on each side, but you are still beyond the spread on the upper side.

Mr. Hertogs: Not according to Judge Denman. You will recall that in one case, your Honor, Judge Denman stated, "If I had been an applicant applying for admission to the United States at the age of 10 years, I would have been rejected and turned down erroneously because I had the physical appearance of a boy of more than 14 at that time."

The Court: That's right, but he didn't have his bones examined. That is what we are referring to now.

Mr. Hertogs: Well, usually the stature runs along with the bone development, because when the bone development quits, that is when the growth quits.

I also think the court is well aware of the demeanor of the witness when he testified. It certainly wasn't that of a young boy.

The Court: Well, Mr. Hertogs, I will be very frank in saying to you that if I was relying upon the testimony of the witnesses in this case, [288] with the exception of this deposition, I would find in favor of the plaintiff. If this deposition wasn't before me, I would find in favor of the plaintiff. We wouldn't have had this argument.

Mr. Hertogs: I well realize the problem the court is confronted with, and that is why I had Dr. Jacobson make such a thorough examination in this case.

The Court: I wanted Dr. Jacobson to make the examination, because I wanted to be sure in my mind. I didn't want to do an injustice to the boy. If Dr. Jacobson had come in and testified that the doctor in Hong Kong was wrong, that he came to the wrong diagnosis, then I could have said, "Well, the doctors don't agree and I don't know which one I could rely on." Then I would hold that the government hadn't sustained the burden, but when the doctor comes in and says, "Yes, assuming that the doctor was qualified, from these X-rays he came to the right conclusion."

You know, when Exhibit 3-E was introduced, that is the group photograph showing the plaintiff on the extreme right——

Mr. Hertogs: That's right.

The Court: I was struck with the fact that it appeared to me that the plaintiff was too small for the age alleged, particularly when I compared it to the other boy in the picture of about the same age. The one was big and husky and the other was skinny and scrawny. [289]

Mr. Hertogs: They testified that he is younger.

The Court: That's right, that is their testimony.

Mr. Hertogs: Yes, your Honor.

The Court: That has bothered me because it seems to me that the pictures don't sustain the testimony. But, however, I would have accepted the testimony of these witnesses in regard to that matter if it hadn't been for this deposition. That is why the deposition is so important and that is why I allowed you to make the motion again so

as to be sure to get in all the objections and to find out the technical objections you had because, regardless of the way I decide this case, I want a good record to go to the Circuit, and I want the Circuit to know exactly my feelings in regard to the matter. Regardless of whether I decide this case for the plaintiff or for the defendant, I urge both of you to appeal. I would like definitely to have this case go on an appeal.

Mr. Hertogs: It is one of the most interesting cases I have had.

The Court: It is an important question we have here.

Mr. Hertogs: As a matter of fact, I will tell your Honor I spent hours trying to find a case directly in point with respect to the deposition of an expert witness taken away from the locality and place of trial and could not find a single case, except I happened to stumble on this one which refers to it in an offhand way. [290]

The Court: I read that case. I don't think Judge Mathes' case does you very much good. You think it does. I don't know. I have read it. I hoped he was talking about depositions, but that was not the case.

Mr. Hertogs: I was particularly impressed, your Honor, I don't know how the court was impressed by the testimony, but referring to that Exhibit 3, if there had been anything false in this particular case or they had wanted to make a substitution, which they have done in other cases, they could have said that this plaintiff was the youngest boy

and used the youngest boy's name, who was supposed to be about two years younger, and we would never have had the problem of age brought up at any time. But as the court will recall, they said, "No, he is the bigger one, because he is older, but he was the smaller one in stature."

Then they compared that picture to the picture attached to the certificate of identity, which has a date on it, and then if you compare it to the one that is attached to the Hong Kong certificate of identity issued by the police department, there seems to be a fantastic growth or an aging of that boy in a short period of time.

The Court: Mr. Hertogs, as I said before, and I reiterate, and I hope if the case is taken up to the Circuit you will underline my reiteration, if it wasn't for this deposition, I would hold in favor [291] of the plaintiff, because I was satisfied with the testimony of the plaintiff's witnesses. I would have held for the plaintiff from the bench, I wouldn't have had to study the record, because I was satisfied, but in the light of that deposition and the findings of the doctor, which has been substantiated by the doctor who testified today, I don't see how I can get around the finding as to his bone age. The X-rays are here and the X-rays haven't been changed.

Mr. Hertogs: No.

The Court: The doctor over in Hong Kong finds he was between nine and ten years of age, and Dr. Jacobson said this morning, assuming that the doctor who made the examination in Hong Kong was

qualified, then he would be justified in finding that the plaintiff, from the X-rays, was nine or ten years of age.

Mr. Hertogs: However, he testified that the X-rays themselves, according to his charts, were of a person, if he were normal, of 10 or 11.

The Court: This has been a difficult case, Mr. Hertogs. I know you have made a number of trips down here from San Francisco, but in the light of the testimony that has been introduced, I don't see how I can do anything except find in favor of the government with the hope that you will appeal.

Mr. Dooley, when you prepare your findings of [292] fact and conclusions of law, will you be very particular to find, or to set out what I am basing my conclusions on?

Mr. Dooley: I will do that, your Honor.

The Court: I want this case to go to the Circuit upon a very clean-cut and clear-cut issue.

Mr. Hertogs: Is the motion denied, your Honor?

The Court: The motion is denied.

Mr. Hertogs: Is the judgment for the government as to both plaintiffs or for one plaintiff?

The Court: I beg your pardon?

Mr. Hertogs: Is this judgment for both plaintiffs or just one of them?

The Court: How about the other plaintiff, Mr. Dooley? Your only question on the other plaintiff is that if there was a mistake, as far as the plaintiff we have been talking about, then I should disregard the testimony of the other witnesses?

Mr. Dooley: Yes, your Honor. I have presented that argument to the court.

The Court: I won't pay very much attention to that argument, Mr. Dooley.

Mr. Dooley: Yes, your Honor.

The Court: Which is the plaintiff that we have been talking about?

Mr. Hertogs: Wong Kwok Wei is the younger [293] one who was under discussion on the age determination. Wong Kwok Keung is the older brother.

The Court: I will find in favor of the older boy.

The Clerk: That is Wong Kwok Keung?

The Court: Yes, and I find against the younger boy.

Mr. Hertogs: Wong Kwok Wei.

Mr. Dooley: Thank you, your Honor.

The Court: Mr. Dooley, will you prepare the findings of fact and conclusions of law in both cases?

Mr. Dooley: I will do that, your Honor.

Mr. Hertogs: We won't have any disagreement on that.

The Court: I know you won't, but I want to be sure that there is inserted in the findings the reason I am holding against the boy. It is primarily because of this deposition.

Mr. Hertogs: I might tell your Honor there will be an appeal.

The Court: I hope there will be an appeal because I would like for the Circuit to make a ruling.

Let's have the Ninth Circuit pave the way and make a ruling.

Mr. Hertogs: I think Mr. Dooley researched the question. You could find no case on the point, could you?

Mr. Dooley: No, your Honor.

Mr. Hertogs: I really researched it for over 10 hours, your Honor. [294]

The Court: I don't doubt that at all. I am satisfied I have had the advantage of the authorities. So we will pass it on to the Circuit now.

Mr. Dooley: Thank you, your Honor.

Mr. Hertogs: Thank you.

The Court: Court will stand in recess now. [295]

[Endorsed]: Filed June 6, 1957.

[Endorsed]: No. 15626. United States Court of Appeals for the Ninth Circuit. Wong Ho, as Guardian ad Litem of Wong Kwok Wei, Appellant, vs. John Foster Dulles, as Secretary of State, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 16, 1957.

Docketed: July 16, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15626

WONG HO as Guardian ad Litem of WONG
KWOK WEI, Appellant,
vs.

JOHN FOSTER DULLES, as Secretary of State,
Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Comes now Wong Kwok Wei, by and through his attorney Joseph S. Hertogs, and files herein a statement of points on which appellant intends to rely in the appeal of the above-entitled matter:

1. The District Court erred in concluding that the plaintiff-appellant, Wong Kwok Wei, is not a United States citizen.

2. The District Court erred in admitting, over objection, defendant's Exhibit C.

Dated: August 12, 1957.

JACKSON & HERTOGS,
/s/ By JOSEPH S. HERTOGS,
Attorneys for Appellant.

[Endorsed]: Filed August 13, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It is hereby stipulated and agreed, by and between the parties hereto through their respective counsel, that the exhibits listed in the "Designation of Record on Appeal" may be considered in their original form without printing.

Dated: August 5, 1957.

/s/ JOSEPH S. HERTOGS,
Attorney for Appellant.
LAUGHLIN E. WATERS,
United States Attorney,

/s/ JAMES R. DOOLEY,
Asst. United States Attorney,
Attorneys for Appellee.

So ordered: August 9, 1957.

/s/ RICHARD H. CHAMBERS,
Judge, United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE INCORPORATED IN TRANSCRIPT ON APPEAL

Wong Kwok Wei, appellant in the above-entitled matter, by and through his attorney, Joseph S. Hertogs, (in accordance with Rule 75(a) of the Federal Rules of Civil Procedure) hereby desig-

nates the following to be included in the Transcript on Appeal on his pending appeal from the judgment made, filed and entered in said matter, March 13, 1957:

1. Petition for Declaratory Judgment.
2. Answer of Defendant.
3. Stipulation dated February 21, 1952.
4. Order substituting party defendant.
5. Order for change of venue.
6. Notice of taking deposition on oral examination.
7. Transcript of evidence and proceedings on the trial, including statements by the Court.
8. Findings of Fact, Conclusions of Law and Judgments filed in this case.
9. Notice of appeal.
10. Stipulation of parties that exhibits may be considered in their original form without printing.
11. Statement of points on which appellant intends to rely on appeal.
12. This designation.

Dated: August 5, 1957.

JOSEPH S. HERTOGS,
Attorney for Appellant.

[Endorsed]: Filed August 13, 1957. Paul P. O'Brien, Clerk.

No. 15,626

IN THE

United States Court of Appeals
For the Ninth Circuit

WONG HO, as Guardian ad Litem of
Wong Kwok Wei,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of
State,

Appellee.

BRIEF FOR APPELLANT.

JACKSON & HERTOGS,

580 Washington Street,

San Francisco 11, California,

Attorneys for Appellant.

FILED

MAY 19 1958

PAUL P. O'BRIEN, CLERK



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No. 15,626

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WONG HO, as Guardian ad Litem of
Wong Kwok Wei,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of
State,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

The plaintiff-appellant, by his guardian ad litem, filed in the United States District Court for the Northern District of California, Southern Division, a petition seeking a declaratory judgment of United States citizenship. Pursuant to stipulation and approval of the District Court, said action was transferred to the United States District Court for the Southern District of California, Central Division (T. 15). Such action was commenced in accordance with the provisions of former Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 8 U.S.C.A. 903).

The District Court denied plaintiff's petition for a declaratory judgment (T. 17-21), and the plaintiff appealed (T. 25). Jurisdiction of this Court to review the District Court's decision is conferred by 28 U.S.C.A. 1291 and 1292.

STATUTES INVOLVED.

Section 1993 of the Revised Statutes of the United States, as amended by Section 1 of the Act of May 24, 1934 (48 Stat. 797) reads:

“Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any such child unless the citizen father or mother, as the case may be, has resided in the United States, previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.”¹

¹The requirement that such children must reside in the United States for at least five years immediately previous to attaining the age of 18 years was retrospectively changed by the 1940 Act to provide that such residence must be between the ages of thirteen

Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) provides, in so far as pertinent here:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *²”

STATEMENT OF THE CASE.

The action for declaratory judgments of United States Nationality was commenced by Wong Kwok Keung and Wong Ho as guardian ad litem for Wong Kwok Wei pursuant to the provisions of Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903), now repealed, and substantially included in Section 360 of

and twenty-one years (8 U.S.C. 601(g)(h)), and was again retrospectively changed by the 1952 Act to require that the child must come to the United States before attaining the age of twenty-three years and must be continuously physically present in the United States for five years between the ages of fourteen and twenty-eight years (8 U.S.C. 1401(b)(c)).

²This statute has been repealed by the Immigration and Nationality Act of 1952 (8 U.S.C. sec. 1101, et seq.) which became effective December 24, 1952, but Section 405(a) of the latter Act continues the former statute in force and effect as to suits which were pending before the new Act became effective (66 Stat. 280).

the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1503).

Both plaintiffs filed with the American Consulate General at Hong Kong, on or about March 8, 1950, an application for issuance of a United States Passport or travel document, claiming that they, and each of them, were the foreign born sons of an American citizen and acquired United States nationality at birth under the provisions of Section 1993, United States Revised Statutes (2 Stat. 153) which was in effect at the time of birth of Wong Kwok Keung, and the same Act as amended by the Act of May 24, 1934 (48 Stat. 797; 8 U.S.C.A. 1401) which was in effect at the time of the birth of the plaintiff-appellant, Wong Kwok Wei. After it was determined by the American Consulate General that the two plaintiffs in the Court action below could not establish their identity and claim to United States nationality, this action was commenced. During the course of trial it was stipulated that the plaintiffs, and each of them, were denied a right or privilege as nationals of the United States on the ground that they were not nationals by the American Consulate General at Hong Kong, an official executive of the defendant herein (T. 45).

The case came to trial without a jury. The appellant, his brother Wong Kwok Keung, also a plaintiff in the Court below, his father Wong Ho and his brothers, Wong Kwok Foo and Wong Kwok Hoy, testified concerning the claimed relationship. In opposition and over objection of counsel, the defendant offered, and the Court admitted, a deposition (Exhibit

C; T. 175-7) of an expert witness taken in Hong Kong, British Crown Colony.

In summing up the evidence introduced during the course of trial, the lower Court stated:

“Mr. Hertogs, as I said before, and I reiterate, and I hope if the case is taken up to the Circuit you will underline my reiteration, if it wasn’t for this deposition, I would hold in favor of the plaintiff, because I was satisfied with the testimony of the plaintiff’s witnesses. I would have held for the plaintiff from the bench, I wouldn’t have had to study the record, because I was satisfied, but in the light of that deposition and the findings of the doctor, which has been substantiated by the doctor who testified today, I don’t see how I can get around the finding as to his bone age.” (T. 263.)

Accordingly, judgment was entered declaring the plaintiff Wong Kwok Keung is now and ever since his birth has been a national of the United States (T. 22-25), and for defendant against the plaintiff-appellant, Wong Kwok Wei. It is from the latter judgment denying the claim of Wong Kwok Wei that the said plaintiff-appellant prosecutes this appeal.

SPECIFICATION OF ERROR.

1. The District Court erred in admitting, over objection, defendant’s Exhibit C.

2. The District Court erred in concluding that the plaintiff-appellant, Wong Kwok Wei, is not a United States citizen.

ARGUMENT.**1. ERRONEOUS ADMISSION OF EXHIBIT C.**

It is well established that the burden of proof upon the plaintiffs in actions filed under Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) is the ordinary one resting upon plaintiffs in a civil action.

Wong Gong Fay v. Brownell, 9 Cir., 228 F2d 1;
Chow Sing v. Brownell, 9 Cir., 235 F2d 602.

Appellant and his brother Wong Kwok Keung were both plaintiffs in the court action below. At the conclusion of the trial a declaratory judgment of United States nationality was entered in favor of Wong Kwok Keung (T. 22-25), and, as heretofore stated, the trial Court denied appellant's petition after stating that

“If it wasn't for this deposition, I would hold in favor of the plaintiff, because I was satisfied with the testimony of the plaintiff's witnesses.” (T. 263.)

Since no appeal was filed in the case of Wong Kwok Keung, it appears that the Government concedes that Wong Ho, appellant's claimed father, is a United States citizen who resided in the United States prior to the birth of the appellant herein. If the relationship of the appellant to the said Wong Ho has been established in accordance with the rule of evidence set forth above, it must be deemed that appellant acquired United States citizenship/nationality at the time of his birth under the statutes then in effect (*supra*, p. 2).

As pointed out by the trial Court, plaintiff and his witnesses resembled a family unit. In addition to the

appellant and his plaintiff brother, Wong Ho, their father, and two recognized United States citizen brothers testified in their behalf. It was stipulated and agreed (T. 125) that Wong Ho made a temporary trip to China, departing on May 30, 1934 and returning to the United States on June 23, 1937. The appellant claims to have been born at the Chung Hing Village, Toyshan District, China on April 30, 1935. The witnesses, Wong Ho, Wong Kwok Keung and Wong Kwok Foo, all testified that they were present in the Chung Hing Village at the time of the birth of appellant herein (T. 142, 116, 65-66). When examined by the Immigration and Naturalization Service upon his return to the United States in June of 1937, Wong Ho then testified that he had a son named Wong Kwok Wei who was born at the Chung Hing Village on April 30, 1935 (Exh. 10(c)). He stated that the appellant herein is the person that he identified at that time. All parties concerned have likewise identified the appellant in Exhibits 3(a), 3(e), 6 and 8.

Appellant and his brother, Wonk Kwok Keung, were both issued certificates of identity under the provisions of Section 503 of the Nationality Act of 1940 by the American Consulate General at Hong Kong on January 21, 1952 (Exhibits 5 and 6). Both were admitted to the United States pending outcome of the Court proceedings, by the Immigration and Naturalization Service on January 28, 1952. Shortly after their arrival (February 21, 1952), it was stipulated and agreed, by and between the parties hereto through their respective attorneys that the appellant Wong

Kwok Wei would submit to a medical and radiological examination to be conducted by the United States Public Health Service at San Francisco, California, pursuant to the provisions of Rule 35 of the Federal Rules of Civil Procedure (Exhibit 12). At the time of trial appellee's counsel stated:

“Why the examination wasn't taken at that time, I have no way of knowing in any form or fashion. The only thing that the Public Health Service up there reported is that they have no record of the examination or whether one was taken and lost.”

Under date of October 5, 1956, counsel for appellee notified counsel for appellant of its intention of taking a deposition on oral examination of one Dr. I. S. Bergius in Hong Kong on November 5, 1956 (T. 16). The deposition of Dr. Bergius, taken pursuant to the notice set forth above, was admitted in evidence as Exhibit C (T. 177) over objection of counsel (T. 175-6; 253).

Legal grounds for admitting Exhibit C are not stated. Apparently it was offered and admitted as within the authorization of Rule 26(d)(3) of the Federal Rules of Civil Procedure. Rule 26(d) of the Federal Rules of Civil Procedure (28 U.S.C.A.) provides as follows:

“(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who

had due notice thereof, in accordance with any one of the following provisions:

* * * * *

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or, 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.”

The quoted rule indicates by its specific language that generally a witness shall be examined on oral testimony and that wherever possible a trial by deposition alone should be avoided. The issue presented here is whether the deposition of an “expert”, expressing a medical opinion, is admissible where the “expert” resides at a greater distance than 100 miles from the place of trial, even though a great number of equally qualified experts are available at the place of trial. Counsel has made a diligent search for judicial precedents relating specifically to this matter, but none has been found.

The Federal Rules of Civil Procedure relating to depositions and discovery were enacted for a two-fold purpose, first—to ascertain facts and to procure evidence, or to secure information as to where such evidence could be obtained, and second—to narrow the triable issues. The right to use depositions for discovery or for limited purposes at a trial of course does not mean that depositions are admissible under all circumstances. An excellent summary relating to the history and purposes of those provisions was set forth by Justice Frank of the Second Circuit in *Arnstein v. Porter*, 154 F2d 464, 471, 472.

Normally, a witness cannot be allowed to testify as to any fact of which he has no personal knowledge. One exception to this rule is testimony of experts. The theory upon which expert testimony is excepted from the opinion evidence rule is that such testimony serves to inform the Court about affairs not within the full understanding of the average man.

Farris v. Interstate Circuit, 5 Cir., 116 F2d 409, 412;

Wigmore on Evidence, Second Edition, Volume 4, pages 118, 119.

It would appear that the rules were modified to permit the introduction of depositions in limited circumstances to prevent injustice, where such depositions are offered as a witness to matters of which the deponent alone had knowledge—in other words, to admit depositions relating to a subject matter which could not be proven without the deponent's testimony. Neither of these criteria are present in the instant matter.

Dr. Bergius, the deponent in Exhibit C, had no personal knowledge concerning the relationship or chronological age of the appellant. Matter of fact, at this time we would like to point out that Dr. Bergius was wholly lacking in any technical skill or education relating to the field of radiology. He was not qualified as an expert and his own testimony indicates strongly that he was not an expert on the subject of inquiry. Certainly qualified experts were readily available to testify on oral examination at the time of trial.

No injustice or unfairness would have resulted if the trial Court had rejected the deposition admitted as Exhibit C. Whereas, on the other hand, the admission of that document definitely was prejudicial to the case of the appellant, since he was denied the right to cross-examine the witness before the trial Court. Even though the same question was not presented, we believe that the statement of Judge Mathes in *Jeffries v. Olesen* (D.C., Cal.), 121 F. Supp. 463, 476, is appropriate:

“At the trial of the case at bar, evidence of plaintiff and his medical witnesses was received for the limited purpose of permitting plaintiff to show that denial of his application to transfer the hearing to Los Angeles was, under the circumstances, not merely a technical denial of procedural due process, but resulted in material prejudice to his defense in the administrative proceedings. Cf. *Coe v. Armour Fertilizer Works*, 1915, 237 U.S. 413, 424, 35 S. Ct. 625, 59 L. Ed. 1027; *Rees v. City of Watertown*, 1873, 19 Wall. 107, 86 U.S. 107, 123, 22 L. Ed. 72. It was sufficient for such purpose merely to show that the Hearing Examiner’s

rejection of the application to transfer had the effect of denying to plaintiff the right of cross-examination on the opinions expressed by the medical witness called to give testimony in support of the administrative complaint. Cf. *Reilly v. Pinkus*, supra, 338 U.S. at pages 275-276, 70 S. Ct. 110; *Shaw v. Duncan*, supra, 194 F2d at pages 782-783."

It is asserted that admission of a deposition of this nature contravenes the language of Rule 1 of the Federal Rules of Civil Procedure which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." The deposition of an expert taken thousands of miles from the place of trial, when more qualified experts are readily available at the place of trial, negates the foregoing provisions. If such deposition was improperly admitted, then the provisions of Rule 43(a) of the Federal Rules of Civil Procedure, which provides that "in all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules" have been disregarded.

For the reasons set forth above, the decision of the Court below must be deemed erroneous as a matter of law.

2. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE APPELLANT IS NOT A UNITED STATES CITIZEN.

The decision of the Court below denying the claim of this appellant is predicated upon expert medical opinion which holds that the bone development of

the appellant is younger than the chronological age claimed.

The Courts, the Board of Immigration Appeals and medical authorities have all stated at various times that there is a wide variation in the normal bone growth of different individuals. The medical basis for the expert opinion is the fact that fusion or ossification of certain bones in the human body occurs at an approximate age in normal individuals. However, all of the authorities relied upon in justification of this determination are based upon actual studies made of individuals of the Caucasian race. It is questionable whether the same studies are applicable to a person of the Chinese race. It must be noted that dates given as a result of x-ray examinations are in any case no more than approximation made by medical estimate based upon the growth of normal individuals, and that considerable variation occurs in individuals depending on environment, especially diet, minor ailments, glandular development and also on hereditary influences.

See:

Mainland, Anatomy, 1945, pages 88-91;

Cohn, Normal Bones and Joints, 1924, pages 5, 10;

“*Normal Bone Growth*”, *Pillmore, Clinical Radiology*, 1946.

Even though the issues presented in each case are different, an examination of Court decisions relating to this matter is helpful. In *Carmichael v. Wong Choon Ock*, 119 F2d 173, at page 174, this Court stated:

“The court below held, and we agree, that this action of the immigration authorities was manifestly unfair. Compare *Gung You v. Nagle*, 9 Cir., 34 F2d 848, 853, *Ex parte Chung Thet Poy*, D.C., 13 F2d 262, affirmed in *Johnson v. Chung Jeng ex rel. Chung Thet Poy*, 1 Cir., 16 F2d 1018, *Ward v. Flynn*, 1 Cir., 74 F2d 145, 146. In *Hom Ark v. Carr*, 9 Cir., 105 F2d 607, cited by appellant, no witness testified from personal knowledge that the applicant was a son of his alleged father. Here there was positive, uncontradicted eyewitness testimony which, in our opinion the immigration authorities had no right to disregard.”

On petition for rehearing in *Carmichael v. Wong Choon Ock*, 122 F2d 829, Judge Denman said:

“* * * It is quite possible my refusal to give weight to the testimony of experts is based upon my belief their conclusions rest on averages of the observed cases. Such averages include extremes which well might cover the physical conditions of the appellant. At ten years of age, because of my size, I was excluded from foot-races for boys under fourteen. . . .

“This is written with a full appreciation of the auditor’s amused tolerance of the mature, relating their early animal vigor, as recalled through the distant perspective of their childhood. However, I have no doubt that if I, at ten years of age and with yellow skin and Mongoloid features, had then arrived from China and sought to establish under the present law my right to enter my country, as is this lad, Wong Choon Ock, and had been subject to the same expert testimony,

my citizenship wrongfully would have been denied.”

In *Chin Ten Teung v. Ward*, 30 F. Supp. 670, the Court rejected medical evidence that appellant was about five years older than he claimed. The Court states at pages 670, 671:

“This son of a citizen is denied admission because a medical examiner, who examined him and X-ray pictures, testified that he was 20 to 21 years of age. The medical examiner was obliged to admit that he was not qualified to say whether his theories respecting skeletal development would hold in the case of one of the Chinese race. There was medical evidence before the Board to the effect that age could not be accurately determined by the degree of ossification. A doctor testified that ‘The reason why I have this conclusion is due to the fact that every author that has done research work on the epiphyses will not state definitely that the epiphyses unite at the definite time due to the fact that these epiphyses are affected by sunlight, fresh air, muscular exercise, diet and glandular disturbance; * * *. They are not definite in their opinion and I think I can’t truthfully say the exact age and there is no one who can say the exact age of any individual within three years. * * *.’

“The Board of Review had before it abundant evidence to the same effect from reputable sources, and also further evidence that the Chinese are of a very different type from the Caucasian, and that among the Chinese there is great variation in the time of junction of the epiphyses with the main part of the various bones to which they belong.”

The difficulty in estimating age was aptly expressed by Judge Garrecht in his dissenting opinion in *Kong Din Quong v. Haff*, 122 F2d 96, at page 99:

“In the absence of authentic and reliable birth records proof of age is difficult to establish. It is common experience that the appearance of a person is very deceiving in estimating age; some people mature earlier than others; some appear older than they really are, others younger. Then there seems to be a general suspicion that people are older than they say. This vagueness and uncertainty is augmented in the case of persons of another race, born and reared in another part of the world, subject to a different climate, diet and environment. An order of exclusion based upon a slight difference between the age claimed and the age suspected or guessed at would be unreasonable.”

Also see:

Hom Ark v. Carr, 105 F2d 607, 610;

Fong On v. Day, 54 F2d 990;

Woo Hoo v. White, 243 Fed. 541.

Similar decisions have also been rendered by the administrative officials charged with enforcement of the immigration and nationality laws of the United States. In a precedent decision, *In re Chin Gim Ton*, A 6 621 397, decided June 6, 1947, the Board of Immigration Appeals, after reviewing the above-cited judicial authorities, stated:

“The difference in age between that claimed by the appellant and the estimate of the Public Health Service ranges from four to eight years.

The difference between the claimed age and the estimates of the Board of Special Inquiry members ranges from three to eight years. It is, however, possible that the Board of Special Inquiry members in reaching their conclusions were influenced by the medical report which had already been introduced in evidence. We have seen that the examination of appellant's teeth, as set forth in the medical report, is inconsistent with the conclusion of the Public Health surgeons that he might be as young as ten or eleven years. The condition of his teeth is more consistent with an age of fourteen. We take the medical report as an estimate that appellant is fourteen years old and hence the difference becomes one of about four years. In view of appellant's undernourished condition, and the variation resulting from racial, environmental, and hereditary influences, we do not think the medical evidence is conclusive. The medical estimate is opinion evidence based on averages, and does not take into account extremes in individual variations from the normal. That evidence, and the impressions suggested to the members of the Board of Special Inquiry by appellant's youthful appearance, are insufficient to overcome the testimony of appellant and Ching Ming Fee."

In the "Monthly Review", Vol. VI, No. 11, page 152, an official publication of the Immigration and Naturalization Service, when considering another precedent case, *In re Chan Yip*, A 5 876 207, the Board of Immigration Appeals concluded that that applicant had established his claim to citizenship even though there was a greater difference between the claimed

chronological age and that of the expert witnesses' physiological determination than exists in the instant matter. The Commissioner of Immigration and Naturalization stated in the *Matter of Cheung Gim Hung*, A 6 771 630, that:

“The difficulty in estimating age is apparent. Individual variations persist. In the matter of estimating age, even though by the best available method and techniques, there results an approximation and never a certainty. It would be unreasonable to enter an order of exclusion based solely on a difference between the age claimed and the maximum age appropriated, where the difference is but two years and a little over six weeks. Even where such difference was about four years, the Board of Immigration Appeals nevertheless held that the disparity was sufficiently accounted for by attendant factors of growth (*Matter of Chin Gin Ton*, A-6621397, June 6, 1947).”

In the *Matter of Hom Chun Wing*, A 6 846 157, where the difference between the claimed chronological age and the medical opinion showed a variance greater than that indicated in this case, the Commissioner stated in his opinion:

“The use of roetgenograms as incontrovertible evidence would be unjust and unwarranted on a scientific basis of facts presented in this case.”

In the *Matter of Gong Bo Lun*, A 5 771 670, the Commissioner stated:

“It cannot be concluded that the medical opinion introduced in this record, by raising a doubt as to whether his claimed age is his true age, has

so impaired or rendered incredible his testimony or that of his alleged parents, that it might be reasonably concluded that he has failed to establish the burden of proof imposed upon him under Section 23 of the Immigration Act of 1924.”

Medical authorities state that in spite of the fundamental similarity of structures in all human subjects striking individual differences occur. The individuality of anatomical structure is very evident if a series of subject is examined. Matter of fact there is a wide variation in the age studies of epiphyseal union between the charts prepared by the various medical authorities. However, they all agree that the chronological age of a person may vary considerably from the physiological development state; that environment, hereditary and nutritional factors do attribute to this variation; that endocrin dysfunctions or malfunctions retard or increase the normal physiology of the human body, and that the matter of estimating bone development age even by the best available methods and techniques result in an approximation and never in a certainty.

Cohn, Normal Bones and Joints, 1924, 5, 10;
Appleton, Hamilton & Tchaeroff, Surface and Radiological Anatomy, 1946, Appendix I;
Pillmore, Clinical Radiology, 1946, Volume 2, page 474;
Mainland, Anatomy, 1945, pages 88-91.

It is interesting to note that the identical question concerning age as disclosed by physiological development was a factor at issue when Wong Kwok Foo,

appellant's fourth brother, sought admission to the United States at the time of his arrival at the Port of Seattle, Washington in 1939 (Exhibit 2; T. 58).

Testimony of all witnesses as to the essential facts concerning the birth and identity of the appellant was clear and complete. In addition, there was substantial documentary evidence identifying the appellant as the true and lawful blood son of Wong Ho, a recognized citizen of the United States. There was no major contradiction on any substantive point. The Court was convinced that the appellant and his witnesses were telling the truth and judgment would have been granted except for the deposition, Exhibit 3 (T. 260, 263). The real issue is whether such expert opinion constituted sufficient basis for rejecting the apparent truthful testimony of the witnesses and the other direct evidence establishing the claimed relationship. The father established the existence of this appellant after his birth when testifying upon the occasion of his return to the United States on June 23, 1937 (Exhibit 10(c); T. 131). The appellant's fourth brother, Wong Kwok Foo, confirmed the identity of appellant at the time of his admission to the United States in 1939, at which time appellant was approximately four years of age. The third brother, Wong Kwok Keung, who was the other plaintiff in the court action below and who accompanied the appellant to the United States, corroborated the testimony and evidence establishing the identity of this individual. The father and the two aforementioned brothers all gave eye-witness testimony regarding the birth of the

appellant herein (T. 142; 65-66; 116). Likewise, all witnesses commented on the difference in the stature of this appellant as compared to his younger brother, stating that—he was older but he was smaller (T. 72, 187, 212, 230). Appellant's second brother, Wong Kwok Hoy, was not present at the time of appellant's birth, but verified the family relationship based upon his own knowledge and personal observation gained during his trip to the family home in China from 1947 to 1949.

This Court, in *Yip Mie Jork v. Dulles*, 237 F2d 383, at page 385, stated:

“Any court may reject evidence, but it may not do so arbitrarily. This court has on numerous occasions held that the trier of fact need not accept uncontradicted testimony when good reasons appear for rejecting it, such as the interest of the witnesses, and improbabilities and important discrepancies in the testimony. However, when uncontradicted testimony has been rejected *without* good reason, we have reversed. E.g., *Gung You v. Nagle*, *supra*; *Louie Poy Hok v. Nagle*, 9 Cir., 1931, 48 F2d 753.”

It is asserted that the expert opinion testimony attacking the chronological age claimed by appellant is not of sufficient substantive and probative value to refute the positive and affirmative evidence establishing the identity of this appellant. Acceptance of a probability based upon a mere estimate could cause a grave injustice of denying the precious privilege of United States citizenship to one to whom it belongs by right of birth. But for this supposition the trial

Court had a “firm conviction” as to the identity and relationship of the appellant and would have granted a judgment of United States nationality to him.

CONCLUSION.

It is submitted that the findings of the Court below are “clearly erroneous” and that the judgment should be reversed.

Dated, San Francisco, California,
April 25, 1958.

Respectfully submitted,
JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
Attorneys for Appellant.

(Appendix “A” Follows.)

Appendix ‘A’

Appendix "A"

<u>Exhibit</u>	<u>Identified</u>	<u>Offered</u>	<u>Admitted</u>
1	31	31	31
2	33	219	220
3	40	221	221
3-A	43	43	146-7
3-B	.....	44	44
3-C	47	49	49
3-D	49	117	117
3-E	49	54	54
3-F	49-50	117	117
3-G	50	117	118
3-H	50	221	221
3-H-1	120	.....	120
3-H-2	120	120	121
4	47	135	135
5	55	109	109
6	55	147	147
7	55-56	110	110
8	56	148	148
9	122	220	221
10	130	220	221
10-A	132	132	133
10-B	132	132	133
10-C	132	132	133
10-D	205	206	206
11	180	180	180
12	.....	218	219
13	238	253	253
14	241	253	253
A	88	89	89
B	89	.....	89
C	.....	175	177

No. 15626
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WONG HO, as Guardian *ad Litem* of WONG KWOK WEI,
Appellant,
vs.

JOHN FOSTER DULLES, as Secretary of State,
Appellee.

BRIEF FOR APPELLEE.

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FILED

JUN 19 1958

PAUL P. O'BRIEN, CLERK

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No. 15626

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WONG HO, as Guardian *ad Litem* of WONG KWOK WEI,
Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,
Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court had jurisdiction of appellant's action to be declared a national of the United States under the provisions of Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A. §903. Since its judgment [R. 20-21]¹ was a final decision, this Court has jurisdiction of an appeal from that decision pursuant to 28 United States Code, Section 1291.

¹"R." refers to the printed Transcript of Record. "Br." indicates references to Brief for Appellant. Exhibits will be indicated by "Ex.". Exhibits followed by numbers are those of appellant (plaintiff) while exhibits followed by letters are those of appellee (defendant).

Statement of the Case.

On April 23, 1951, appellant and his alleged brother, Wong Kwok Keung, instituted an action in the United States District Court for the Northern District of California, seeking a judgment declaring them to be nationals of the United States [R. 3-9]. On June 29, 1956 their action was transferred to the Court below [R. 15].

On October 5, 1956 appellee filed and served upon counsel for appellant a Notice of Taking Deposition on Oral Examination. This notice provided for taking the deposition of Dr. I. S. Bergius, a resident of Hong Kong, B. C. C. before a Vice Consul of the United States in Hong Kong. Appellant interposed no objection to this notice.

Trial commenced at Los Angeles, California on January 22, 1957 [R. 27]. During trial the deposition of Dr. Bergius [Ex. C] was received in evidence over objection of counsel for appellant [R. 175-177]. Attached to this deposition was a radiograph of appellant [Ex. C] taken on March 14, 1951, when appellant, according to his claimed birthdate (April 30, 1935) would have been 15 years, 10 months, and 14 days of age. There was also received in evidence an X-ray of appellant made on January 31, 1952 [Ex. 13].

In his deposition Dr. Bergius concluded from the radiograph of March 14, 1951 that appellant was then 9 to 10 years of age [Ex. C, p. 5]. Dr. George Jacobson, *an expert witness called on behalf of appellant* concluded from the same radiograph that appellant was between 10 and 11

years of age (“closer to the 10 year standard”) [R. 240-241, 243, 248-249].

At the conclusion of the trial the District Court found that appellant was “considerably younger than his claimed age” [R. 19] and that he “has not sustained his burden of proving that he is the true and lawful blood son of Wong Ho; nor has said plaintiff sustained his burden of proving that the person who purports to be Wong Kwok Wei, in in truth and in fact Wong Kwok Wei” [R. 19]. The court below concluded that appellant had failed to sustain his burden of proving his claim to United States citizenship and/or nationality, and entered judgment denying the relief for which appellant prayed [R. 19-20]. Judgment was entered declaring appellant’s alleged brother, Wong Kwok Keung, to be a national of the United States [R. 24-25].

Issues Involved.

1. Did the District Court err in admitting, over objection, appellee’s Exhibit C?
2. Did the District Court err in concluding that appellant had failed to sustain his burden of proving his claim to United States nationality?

Statutes Involved.

Section 1993 of the Revised Statutes of the United States, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, provides:

“Any child hereafter born out of the limits and jurisdiction of the United States, whose father or

mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A. §903, provides in pertinent part:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad may institute an action against the head of such Department or agency in the District Court of the United States for the district of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

ARGUMENT.

I.

The District Court Did Not Err in Admitting, Over Objection, Exhibit C.

Exhibit C, the deposition of Dr. Iain S. Bergius, was received in evidence by the District Court over objection of counsel for appellant [R. 175-177]. Ample authority for the receipt of this exhibit is found in Rule 26(d)(3), Federal Rules of Civil Procedure, which provides in pertinent part as follows:

“(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or *who had due notice thereof*, in accordance with any one of the following provisions:

* * * * *

“(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: * * * 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; * * *”
(Emphasis added).

Rule 26(d) is substantially the same as former 28 U. S. C. §641² providing for the use of depositions taken *de bene esse* (see, Notes of Advisory Committee on

²Section 865, Revised Statutes of the United States.

Rules, 28 U. S. C. A. page 171; see also, 2 Moore's Federal Practice §2630, page 1193.) Under the former statute depositions were uniformly admitted where the witness resided more than one hundred miles from the place of trial (*Patapsco Insurance Co. v. Southgate*, 5 Peters (30 U. S.) 604 (1831); *Anglo California Nat. Bank v. Lazard*, 106 F. 2d 693, 697 (9th Cir. 1939); *Nieman v. Plough Chemical Co.*, 22 F. 2d 73 (6th Cir. 1927); *Campbell v. Willis*, 290 Fed. 271 (Dist. Col. Cir. 1923); *Texas & P. Ry. Co. v. Reagan*, 118 Fed. 815 (5th Cir. 1902); Compare: *Whitford v. Clark County*, 119 U. S. 522 (1886)).

Similarly, under the Federal Rules of Civil Procedure and equivalent state provisions, where the conditions precedent are met, depositions are admitted as a matter of course (*Weiss v. Weiner*, 10 F. R. D. 387 (D. C. Md. 1950); *Aircraft Radio Industries v. M. V. Palmer*, 277 P. 2d 737, 45 Wash. 2d 737 (1954)), if not as a matter of right (*Richmond v. Brooks*, 227 F. 2d 490 (2d Cir. 1955); *Hiltibrand v. Brown*, 234 P. 2d 618, 124 Colo. 52 (1951)).

The deponent in the case at bar, Dr. Bergius, resided in Hong Kong, B. C. C. [R. 16; Ex. C]³ a distance greater than one hundred miles from Los Angeles, California, the place of trial and out of the United States.⁴ Condi-

³The residence of a witness at the time his deposition is taken will be presumed to continue unless the contrary is shown (*Whitford v. Clark County*, 119 U. S. 522 (1886); *Campbell v. Willis*, 290 Fed. 271 (Dist. Col. Cir., 1923)).

⁴This Court may take judicial notice of these facts (Cf. *DeWitt v. Wilcox*, 161 F. 2d 785, 787 (9th Cir., 1947), cert. den. 332 U. S. 763; *Ex parte Zimmerman*, 132 F. 2d 442, 445 (9th Cir., 1952), cert. den. 319 U. S. 744; *Aircraft Radio Industries v. M. V. Palmer*, 277 P. 2d 737, 740, 45 Wash. 2d 737 (1954)).

tions for receipt of his depositions were therefore clearly met. *Arnstein v. Porter*, 154 F. 2d 464 (2d Cir. 1946), relied upon by appellant, is clearly distinguishable. There, the defendant whose deposition was admitted resided “in the district and within a few miles of the place of trial” (154 F. 2d at p. 472). Moreover, the District Court in *Arnstein* had granted summary judgment for the defendant; whereas the Circuit Court of Appeals found a genuine issue of a material fact to exist. Since summary judgment will not lie under such circumstances (Rule 56, Federal Rules of Civil Procedure; *Fountain v. Filson*, 336 U. S. 681 (1949)), the court’s discussion of the use of depositions would seem to be dicta.

Appellant raises the issue of

“whether the depositions of an ‘expert’, expressing a medical opinion, is admissible where the ‘expert’ resides at a greater distance than 100 miles from the place of trial, even though a great number of equally qualified experts are available at the place of trial.” (Br. 9).

Appellant apparently overlooks the fact that Dr. Bergius *did not testify solely as an expert*. His testimony was necessary to identify the radiograph which was made of appellant on March 14, 1951. There were no expert witnesses in the United States who could have identified this radiograph. Its identification was essential, because a more accurate determination of age based upon bone development is possible in the case of a younger child than an older one [R. 242; Ex. C, p. 8]. Moreover, Rule 26(d) (3), Federal Rules of Civil Procedure, draws no distinction between an expert and other witnesses. Nor should a difference be made here, especially since Dr.

Bergius possessed essential information which no expert in the United States possessed.

Appellant was not denied the right of cross-examination. A Notice of Taking Deposition on Oral Examination was filed and served on counsel for appellant on October 5, 1956 [R. 16]. No objection to this notice was interposed. Had appellant wished to avoid the expense of retaining counsel in Hong Kong to represent him at the taking of the deposition, he could have moved for an order of protection as authorized by Rule 30(b), Federal Rules of Civil Procedure. The Court below might then have compelled appellee to proceed upon written interrogatories. Appellant objected to the deposition for the first time at trial. It was then too late for appellee to secure the essential testimony of Dr. Bergius or to identify the radiograph attached to his deposition by other means. By his inaction appellant waived the right of cross-examination (26-A C. J. S. Depositions §68, p. 393; *Boatman v. Coverdale*, 80 Okl. 9, 193 Pac. 874 (1920)).

Appellant challenges the expert qualifications of Dr. Bergius as a ground for excluding his deposition. Exhibit C shows, however, that Dr. Bergius was a medical practitioner [Ex. C, p. 1], had made studies in the field about which he testified [Ex. C, p. 2], and had examined a considerable number of persons in order to determine their ages [Ex. C, p. 7]. It has been held that a physician is not incompetent to testify as an expert merely because he is not a specialist in the particular field of which he speaks (*Sher. v. De Haven*, 199 F. 2d 777, 782 (Dist. Col. Dir. 1952), cert. den. 345 U. S. 936). Moreover, whether a witness is qualified to give expert testimony is a matter resting largely within the discretion of the trial court, and its ruling thereon will not be disturbed on appeal

unless there was clear error (*Atchison, Topeka and Santa Fe Railway Co. v. Jackson*, 235 F. 2d 390, 393-394 (10th Cir. 1956); *E. L. Farmer & Company v. Hooks*, 239 F. 2d 547, 553 (10th Cir. 1956), cert. den. 353 U. S. 911; *Pacific Live Stock Co. v. Warm Springs Irr. Dist.*, 270 Fed. 555 (9th Cir. 1921); *Sher v. De Haven*, *supra*).

II.

The District Court Did Not Err in Concluding That Appellant Had Failed to Sustain His Burden of Proving His Claim to United States Nationality.

Appellee concedes that the burden of proof which plaintiffs must sustain in actions under Section 503 of the Nationality Act of 1940 is an ordinary one (*Wong Gong Fay v. Brownell*, 238 F. 2d 1 (9th Cir. 1956); *Chow Sing v. Brownell*, 235 F. 2d 602 (9th Cir. 1956); *Ly Shew v. Dulles*, 219 F. 2d 413, 416 (9th Cir. 1954)). This rule was recognized by the court below [see, Finding of Fact VII and Conclusion of Law II, R. 19-20]. However, it is equally clear that findings of fact by the trial court will not be set aside on appeal unless clearly erroneous (Rule 52(a), Federal Rules of Civil Procedure; *United States v. United States Gypsum Co.*, 333 U. S. 364, 395 (1948); *Lew Wah Fook v. Brownell*, 218 F. 2d 924 (9th Cir. 1955), cert. den. 349 U. S. 944; *Attorney General of the United States v. Ricketts*, 165 F. 2d 193 (9th Cir. 1947)).

Appellant claims to have been born on April 30, 1935 [R. 5]. On March 14, 1951, when according to his claimed birthdate he would have been 15 years, 10 months, and 14 days of age, a radiograph of his bones was taken [see radiograph attached to Ex. "C"]. Dr. Bergius concluded from this radiograph that appellant was then only 9 to 10 years old [Ex. C, p. 5]. Dr. George Jacobson,

an expert witness called on behalf of the appellant, concluded from the same radiograph that appellant was between 10 and 11 years of age [R. 240-241, 243, 248-249].⁵

On January 31, 1952 appellant's counsel had an X-ray made of him at the X-ray laboratory of Dr. Maurice Robinson, San Francisco, California [R. 239; Ex. 13]. According to his claimed birthdate, appellant would then have been 16 years, 9 months, and 1 day old. Yet, at trial Dr. Jacobson testified that based upon this X-ray appellant was at that time approximately 12 years and 6 months of age [R. 241].

Dr. Jacobson gave the normal variant for the age of 10 as two years in either direction [R. 249]. In response to a question by the court as to whether the X-rays taken on March 14, 1951 could indicate a boy of 15 he stated [R. 250]:

"The Witness: I would say this, sir. If this boy [276] is stated to me to be 15, then *I would say these X-rays are definitely abnormal.*" (Emphasis added.)

Again, referring to the X-ray taken on January 31, 1952, Dr. Jacobson testified [R. 252]:

"Q. That is still abnormal? A. Yes.

Q. But that is closer to the normal age than the picture reflected by the March 1951 X-ray? A.

⁵In this connection Dr. Jacobson stated [R. 248-249]:

"The Witness: I would have, according to these standards that we have here, your Honor, I would have placed him somewhere between the ages of 10 and 11, which is not too far off from nine and 10. I would say according to these pictures here, *he is probably closer, he fits closest to the 10 year standard* and possibly between the 10 and 11. He doesn't fit very well the nine year standard at all." (Emphasis added.)

Slightly, not much more than slightly. If you tell me this boy is 16½ and his bone age corresponds to roughly 12½, or the absolute maximum on this film here of 13 years and 3 months, but more closely to that of 12 years and 6 months, there is a four-year discrepancy, which is somewhat beyond normal expectation.” (Emphasis added.)

Thus, the finding of the District Court that appellant was “considerably younger than his claimed age” [R. 19] is supported not only by the deposition of Dr. Bergius and the radiograph annexed thereto [Ex. C], but by the X-ray introduced in evidence by appellant [Ex. 13] and the testimony of appellant’s own expert as well.

The courts have sanctioned denial of a claim to citizenship where an age determination *based upon scientific evidence and expert testimony* showed the claimant to be older or younger than his purported age.

United States ex rel. Mark Guey Him v. Reimer, 115 F. 2d 241 (2d Cir. 1940);

Kong Din Quong v. Haff, 112 F. 2d 96 (9th Cir. 1940), cert. den. 311 U. S. 706;

Hom Ark v. Carr, 105 F. 2d 607 (9th Cir. 1939);

United States ex rel. Fong On v. Day, 54 F. 2d 990 (2d Cir. 1932);

United States ex rel. Eng Fon Sing v. Reimer, 40 Fed. Supp. 602 (S. D. N. Y. 1940), affd. 122 F. 2d 552 (2d Cir. 1941), cert. den. 314 U. S. 689;

United States ex rel. Chung Yuen Poy v. Corsi, 2 Fed. Supp. 260 (S. D. N. Y. 1932), affd. 62 F. 2d 777 (2d Cir. 1933);

United States ex rel. Chin Cheung Nai v. Corsi, 55 F. 2d 360 (S. D. N. Y. 1931), affd. 64 F. 2d 1022 (2d Cir. 1933).

As this Court in *Hom Ark v. Carr, supra*, observed (p. 610):

“X-ray pictures are not, of course, an infallible means of determining age. No one claims that they are. Nevertheless, to a medical expert, such pictures may be a valuable aid in arriving at an opinion on that subject. * * *”

And as the Court in *United States ex rel. Chin Cheung Nai v. Corsi, supra*, pointed out (p. 360):

“The contention that the medical evidence as to the age of a person is so unreliable as necessarily not to be dependable is without merit.”

Carmichael v. Wong Choon Ock, 119 F. 2d 173 (9th Cir. 1941), rehearing denied 122 F. 2d 829, is distinguishable. In that case no X-rays were used, but the so-called “experts” relied solely upon their observation of the applicant. That a different result would have obtained had the age determination been based upon scientific evidence was indicated by Judge Denman in his opinion denying the petition for rehearing (122 F. 2d at p. 829):

“* * * No doubt my bones would have shown their development to the experts. At fourteen I was tough fibered enough to take the gaff of days of duck shooting with the market hunters in the San Joaquin delta, the pelagic sealers who wintered there.” (Emphasis added.)

The District Court found that appellant Wong Kwok Wei had failed to establish his burden of proving his claim to citizenship [R. 19-20] while declaring his alleged brother, Wong Kwok Keung to be a citizen [R. 24-25]. The record discloses grounds for this difference in conclusion other than appellant’s age discrepancy.

Where one claims derivative citizenship under Section 1993 of the Revised Statutes of the United States, he and/or his claimed relatives would normally be expected to have in their possession, letters, photographs, or other documents of sufficient age to attest to the bona fides of the claimed relationship. Wong Kwok Keung appeared on a group photograph which was taken in 1934 with his parents and one of his brothers [Ex. 3-C; R. 48, 111-112, 184]. He also is shown on a photograph with his mother [Ex. 3-D; R. 116-117, 138] and on a group photograph of alleged members of the family [Ex. 3-E; R. 51, 112, 138, 185-186]. The only group photograph on which appellant purportedly appears is Exhibit 3-E, which was taken in 1949 only a short time before appellant applied to come to the United States as a citizen.

All of the letters comprising Exhibit 3-H-1 were addressed to Wong Kwok Keung, with the exception of one which was addressed to his mother [R. 118-120, 139-140]. Not a single letter was offered in evidence, either to or from the appellant. Appellant neither wrote to his alleged father and brothers in the United States nor received any letters from them [R. 165-166]. All of the receipts indicating that money was sent to China show that the money was sent to Wong Kwok Keung [Ex. 3-H-2; R. 121, 140-141]. In addition, Wong Kwok Keung produced a letter and student card from Lingnan University, which documents bore his photograph [Exs. 3-F and 3-G; R. 117].

It should also be noted that appellant and his alleged younger brother, Wong Kwok Jin, were not living in the family home in 1947, but were living in the "community house" [R. 194, 210, 212]; and appellant's alleged father, Wong Ho, indicated an unwillingness to submit

to a blood test in connection with appellant's claim [R. 204]; although the evidentiary value of the latter fact may be questionable in view of *Fong Sik Leung v. Dulles*, 226 F. 2d 74 (9th Cir. 1955).

While the District Court did not expressly comment upon the difference in evidence as between appellant and his alleged brother, his finding that appellant "has not sustained his burden of proving that he is the true and lawful blood son of Wong Ho" [R. 19] would seem to be sufficiently broad to encompass this difference. Moreover, if the decision of the court below is correct, it must be affirmed, although the District Court may have relied on the wrong ground or may have given the wrong reason (*Helvering v. Gowran*, 302 U. S. 238 (1937); *Kam Koon Wan v. E. E. Black, Limited*, 188 F. 2d 558 (9th Cir. 1951)).

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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